Gandhi Memorial College Of Education Bantalab Jammu

GENERAL LAWS

for Intermediate Examination of the Institute of Company Secretaries of India

N.D. KAPOOR
RAJNI ABBI

SULTAN CHAND & SONS

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IMPORTANT

The present edition covers new syllabus (effective from June, 1994 Examination).

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GENERAL LAWS AND PROCEDURES

(For Intermediate Examination of the Institute of Company Secretaries of India and other Post-Graduate Courses —effective from June, 1994)

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Preface

To the Third Edition

The present edition has been thoroughly revised and recast to improve the readability of the book. This has been possible in view of the fact that since the appearance of the last edition there has been no change in any of the Statutes discussed in this book. However the intrusion of the State into the statutory provisions through notifications and rule-making power continues unabated. These Notifications and Rules, where relevant or necessary, have been taken note of in this edition. The case-law which is no less an important source of law and which is ever giving new interpretation to statutory provisions has also been given pride of place in this edition.

A glossary of legal terms in foreign languages so often used by our learned judges has been given in the prefatory pages.

The credit for illustrative examples and clarification of many statutory provisions goes to Shri Bharat Bhushan. He also helped the authors in collecting the source material. The book really owes much to his vigilance.

The law in the book is stated as at 1st December, 1993.

In a stupendous work like this some errors are likely to creep in in spite of authors' best efforts. The authors shall be highly obliged if these errors are pointed out so that they can be taken care of in subsequent editions. Suggestions for the improvement of the book shall be gratefully acknowleged.

N.D. KAPOOR
RAJNI ABBI

January 1, 1994

To the Second Edition

The first edition of the book was sold out much sooner than was expected. The authors feel really elated on two counts : *one*, that the book has met the need of students appearing for Intermediate Examination of the Institute of Company Secretaries of India ; and *two*, that the book has been included in the list of Recommended Readings of the Institute of Company Secretaries of India. This has encouraged the authors to reinvigorate the book and add new material. The following Chapters have been completely rewritten :

1. The Constitution of India.
2. Interpretation of Statutes.
3. The Indian Evidence Act, 1872.
4. The Civil Procedure Code, 1908.
5. The Criminal Procedure Code, 1973.

In other Chapters, only marginal changes have been made. The revision has been done in the light of the questions set in the Intermediate Examination of the Institute.

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The authors owe a debt of gratitude to Dr. S.P. Narang, Director of Studies, Institute of Company Secretaries of India, for his constant encouragement, help and inspiration that he provides in abundance.

N.D. KAPOOR
RAJNI ABBI

January 1, 1991

To the First Edition

The chief aim in writing this book is to present the fundamental principles of General Laws in a simple and easily intelligible manner. The intricate points of law have been illustrated by examples, and the subject has been dealt with by topics rather than in the strict order of the Sections in the various Acts. This has been done to avoid cross-referencing to enable the students to grasp each aspect of the subject thoroughly. The book is unusual in the simplicity with which the various topics have been dealt with. At the same time, the treatment of the subject is both comprehensive and easy to follow. The approach all through has been to assume no previous knowledge on the part of the reader. The exposition of the subject, therefore, is simple and direct to the extent possible. As such, any person, may he be a beginner, can pick up the subject without tears and put it into practice in his day-to-day lif.

The book presents a broad overview of a vast and growing subject. One has virtually to be racing at jet speed to really catch up with the latest developments. Our humble attempt has been to keep pace. Throughout, our endeavour has been to present a succinct but at the same time a comprehensive analysis of the subject and to focus attention on important points.

The subject has been discussed in the light of Statute law and *ratio decidendi*. The relevant Sections of an Act on a point of law have been given in parenthesis. The decided cases have also been referred to and cited when they illustrate or settle the law on a particular point. At places reference has also been made to the English Law which is the most important source of the Indian Law. It is hoped the book will serve the useful purpose of charting the course and bringing out the most important points into sharp relief.

Further, to help students in assessing and evaluating how much they have learnt and grasped, Test Questions and Pratical Problems (with Hints for their solution) have been given at the end of each Chapter. Each solution contains a brief hint as to how a problem is to be solved. This will go a long way in helping the bewildered students in answering the problems which are invariably set in every examination in Law.

Suggestions for the improvement of the book are welcome and shall be gratefully acknowledged. However mighty efforts the authors may have put in, their firm belief is that the exercise would remain incomplete without the active co-operation of the readers for whom this book is meant.

N.D. KAPOOR
RAJNI ABBI

May 19, 1988

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List of Foreign Words and Phrases

accessio cedit principali—an accessory thing when annexed to a principal thing becomes part of the principal thing.

actio personalis mortar cum persona—a personal action dies with the promisor.

actus non facit reum, nisi mens sit rea—an act does not constitute guilt unless it is done with a guilty intent.

Aequitas—Equity, *i.e.*, fair or just according to natural law.

allegans contraria non est audiendus—a person alleging contradictory facts should not be heard.

bona fide—in good faith, honestly, without fraud, collusion or participation in wrongdoing.

certiorari—a writ of a superior Court calling forth the records and entire proceedings of an inferior Court or a writ by which causes are removed from an inferior Court into a superior Court.

cestui que trust—a person for whom another is trustee : a beneficiary.

contemporanea expositio est optima et fortissima in lege—the best way to construe a document is to read it as it would have read when made.

Curia regis—the King's Court.

damnum sine injuria—damage without a legal wrong.

de minimis non curat lex—law does not concern itself with trifles.

de novo—anew.

delegatus non potest delegare—a delegate cannot further delegate.

donatio mortis causa—a gift of personal property made in contemplation of death.

ejusdem generis—of the same kind or nature.

et incumbit probatio qui dicit, non qui negat—the burden of proof is on him who alleges, and not on him who denies.

ex gratia—as an act of grace or favour.

ex post facto—by a subsequent act

ex turpi causa non oritur actio—no action arises from a base cause.

expressio unius personae vel rei, est exclusio alterius—special or express mention of one thing or person implies exclusion of another.

feme sole—an married woman.

ferae naturae—of a wild or ferrocious nature.

functus officio—having discharged his duty. Thus once an arbitrator has given his award, he is *functus officio*, and cannot revoke the award and re-try the case.

generalia specialibus non derogant—general things do not derogate from special things.

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generalibus specialia derogant—special things derogate from general things.

habeas corpus—a prerogative writ to a person who detains another in custody and which commands him to produce or 'have the body of that person before him.'

in personam—an act, proceeding or right done or directed against or with reference to a specific person, as opposed to *in rem.*

in rem—an act, proceeding or right available against the world at large, as opposed to *in personam.*

ignoratia juris non excusat—ignorance of law is no excuse.

injuria sine damnum—legal wrong without a damage.

inter vivos—during life, between living persons.

lex fori—the law of the forum or Court in which a case is tried. More particularly the law relating to procedure or the formalities in force (adjective law) in a given place.

lex mercatoria—the law merchant.

lis pendens or 'lite pendente—a pending suit, action, petition or matter, particularly one relating to land.

litera legis—letter of the law.

mandamus—(we cammand) a prerogative writ or command issued by a higher Court to a lower Court.

mansuetae naturae—harmless or tame by nature.

mens rea—guilty mind, an evil intention, or a knowledge of the wrognfulness of an act.

mesne—middle, intervening or intermediate.

nocumentum—an annoying, unpleasant or obnoxious thing or practice.

non obstante—nothwithstanding.

noscitur a sociis—a word is known by its associates, *i.e.*, the meaning of a word can be gathered from the context.

obiter dictum—(a saying by the way) an incidential and collateral opinion uttered a by a judge while delivering a judgment and which is not binding.

pari materia—on the same subject.

pendente lite—during the process of litigation.

per se—by itself.

prima facie—on the face of it.

qui facit per alium facit per se—he who acts through another is deemed to act in person.

qui prior est tempore potior est jure—he who is first in time has the strongest claim.

qui sentit commodum debet et onus—He who accepts the benefit of a transaction must also accept the burden of the same.

quia timet—because he fears.

quo warranto—(by what authority) a prerogative writ requiring a person to show by what authority he exercises a public office.

ratio legis—according to spirit of law.

ratio decidendi—the reason or ground of a judicial decision. It is the *ratio*

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decidendi of a case which makes the decision a precedent for the future.

re—in the matter of.

res communes—common things ; things common to all by the law of nature.

res extra commercium—things thrown out of commerce.

res gestae—all facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it one continuous transaction.

res ipsa loquitur—the thing speaks for itself.

res judicata—a case or suit already decided.

res sub judice—a matter under judicial consideration.

scienter—knowledge ; an allegation in a pleading that the thing has been done knowingly.

scienti non fit injuria—an injury is not done to one who knows.

sic utere tuo ut alienum non laedas—live and let live and be reasonable as to your acts in regard to your neighbours.

spes successionis—a mere hope of succeeding to property.

stare decisis—adherence to earlier precedents as authoritative and binding.

stauts quo—the state in which things are, or were.

status quo ante—the state in which things were.

sub silentio—under silence.

supra—above.

ubi jus ibi remedium—where there is a right, there is a remedy.

ut lite pendente nihil innovateur—nothing new should be introduced during the pendency of a suit.

ut res margis valeat quam pereat—It is better for a thing to have effect than to be made void, *i.e.*, the words of a statute must be constructed so as to give a sensible meaning to them.

vigilantibus non dormientibus leges subveniunt—the law aids the diligent and not the indolent.

volenti non fit injuria—where there is consent, there is no injury.

volkogeist—general awareness of the people.

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SYLLABUS FOR INTERMEDIATE EXAMINATION

(effective from June, 1994)

[Regulation 41-AA (2)]

(Each paper will be of three hours duration and will carry 100 marks. The medium of writing the examination will be English, provided that it shall be competent for the Council to permit, subject to such conditions as it may deem fit and after giving sufficient advance information to the candidates, the use of Hindi as a medium of writing for any particular subject. Candidates are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination).

GROUP—PAPER 1

GENERAL LAWS AND PROCEDURES

Level of knowledge : Basic knowledge.

Objective : To provide basic understanding of some of the general laws and procedures thereunder, which have a bearing on the conduct of corporate affairs.

Detailed contents

1. INTRODUCTION. Sources of Law—custom, legislation ; categories of legislation ; tortius liability—kinds, general defences, judicial and extra-judicial remedies

2. CONSTITUTION OF INDIA. Broad framework of the Constitution ; Fundamental Rights ; Directive Principles of State Policy : ordinance-making powers of the President and the Governor ; legislative powers of the Union and the States ; freedom of trade commerce and intercourse ; constitutional provisions relating to State monopoly ; writ jurisdiction of High Courts and the Supreme Court, different types of writs—*habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* ; delegated legislations.

3. INTERPRETATION OF STATUTES. Need for interpretation of a statute ; general principles of interpretation—internal and external aids to interpretation, primary and other rules.

4. CIVIL AND CRIMINAL PROCEDURE CODES AND LAW OF EVIDENCE

   (a) THE CODE OF CIVIL PROCEDURE, 1908. Elementary knowledge of the structure of civil courts, their jurisdiction—pecuniary jurisdiction, territorial jurisdiction, basic understanding of certain terms—order, judgment and decree, stay of suits, *res judicata* ; suits by companies, minors, basic understanding of summary proceedings, appeals, reference, review and revision.

   (b) THE CRIMINAL PROCEDURE CODE, 1973. Offences—*mens rea*, cognizable and non-cognizable offences ; bail ; continuing offences ; searches ; limitation for taking congnizance of certain offences.

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(c) THE INDIAN EVIDENCE ACT, 1872. The object of the study of the law of evidence, relevant facts, *res gestae* ; motive, preparation and conduct ; admissions ; confessions ; facts of which edvidence need not be given ; facts of which evidence cannot be given ; oral, documentary and circumstantial evidence.

5. THE SPECIFIC RELIEF ACT, 1963 (47 of 1963). Instances where specific performance is allowed ; recovery and immovable property ; persons against whom specific performance can be enforced ; discretion of court ; preventive reliefs.

6. THE ARBITRATION ACT, 1940 (10 of 1940). Arbitration agreement—format ; appointment of arbitrator, umpire ; powers of the arbitrator ; award—remission, setting aside, modification and filing thereof ; stay of legal proceedings—effect of legal proceedings on arbitration ; conduct of arbitration proceedings ; a brief idea of foreign aswards, arbitration agencies—Indian Council of Arbitration, Trade Associations.

7. THE LIMITATION ACT, 1963 (36 of 1963). Computation of period of limitation for different types of suits—continuous running of time, extension of period of limitation, limitation and writs under the Constitution.

8. THE INDIAN TRUSTS ACT, 1882 (2 of 1882). General concepts relating to trusts ; creation of trusts ; duties and liabillities of trustees ; rights and powers of trustees, disabilities of trustees and rights and liabilities of the beneficiary.

9. THE SOCIETIES REGISTRATION ACT, 1860 (21 of 1860). General concepts relating to registration of societies ; property of societies how vested ; suits by and against societies ; enforcement of judgment against societies ; dissolution of societies.

10. GENERAL PRINCIPLES OF CO-OPERATIVE LAW AND PRACTICE. Formation, registration and organisation of co-operative societies, membership ; general body, managing committee ; model bye-laws and amendment thereof, meetings of co-operative societies ; adit and inspection ; liquidation proceedings.

11. THE TRANSFER OF PROPERTY ACT, 1882 (1 of 1882). Important definitions ; movable and immovable property, properites which cannot be transferred, rule against perpetuties ; *lis pendens* ; provisions relating to sale, mortgage, charge, lease, gift and actionable claim.

Note : Chapters 1 to 14 of the Book cover this syllabus.

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1

Law and Its Sources

Man is by nature a social being. He comes into contact with other individuals in different capacities. For example, he comes into contact with landlord as a tenant, with Government as a taxpayer, with customers as a seller and with suppliers as a buyer. These contacts or associations are the inevitable consequence of modern civilisation. In all these associations, he is expected to observe a code of conduct or a set of rules. The object of these rules is to make human associations possible and to ensure that members of the society may live and work together in an orderly and peaceful manner.

WHAT IS LAW ?

The word 'law' is a general term and has different connotations for different people, *e.g.*,

(1) A citizen may think of law as a set of rules which he must obey.

(2) A lawyer who 'practises law' may think of law as a vocation.

(3) A legislator may look at law as something created by him.

(4) A judge may think of law as a guide and principles to be applied in making decisions.

(5) A social scientist may think of law as a means of social control.

(6) A legal philosopher may consider law as 'dictate of reason' or 'right reasoning'.

Thus a man's perspective or point of view influences his notions about law and as such its meaning. It is, therefore, not possible to give a single, precise definition of law. It is often preceded by an adjective to give it a more precise meaning, *e.g.*, civil law, criminal law, mercantile law, industrial law, international law. However, in the legal sense with which we are concerned in this book, 'law' includes all the *rules and principles which regulate our relations with other individuals and the State and which are enforced by the State.*

The State regulates the conduct of its people by a set of rules. It ordains, directly or indirectly, implicitly or explicitly, a general course of conduct to be followed by the people. *Such rules of human conduct, if recognised by the State and enforced by it on people, are termed as 'law'.*

In the words of Salmond, "Law is the body of principles recognised and applied by the State in the administration of justice." Woodrow Wilson has defined law as "that portion of the established habit and thought of mankind which has gained distinct and formal recognition in the shape of uniform rules backed by the authority and power of the government." It represents a code of human conduct which is established and enforced by the State. Law, in

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this sense, has two-fold aspect : It is an abstract body of rules and also a social machinery for securing order in the community.

Some important points

The definitions of law given above contain the following important points :

1. *Law is a body of rules.* When we speak of 'the law', it means 'the whole of the law' of the land. This includes Statute Law, like the Indian Contract Act, 1872, the Indian Partnership Act, 1932, the Arbitration Act, 1940, case law, customs and usages.

2. *Law is for the guidance of human conduct.*

3. *Law is imposed.* Law is generally imposed by some authority in whom special power is vested, like Municipal bodies, State Legislative Assemblies and Parliament. All Statute Law is imposed by the State. Case law laid down by the superior Courts is binding on all lower Courts. In that sense it is also imposed. Customs and usages, practised over a long period and followed by people, also acquire the force of law.

4 *Enforcement.* The chief characteristic of law is that it is enforced. This enforcement is carried out by the State. If a law cannot be enforced, it ceases to be a law.

5. *The State.* The existence of law presupposes a State. A State is a territorial division in which a community or people live subject to a uniform system of law administered by a sovereign authority. India comprises a Union of States and the Territories thereof as specifed in the First Schedule to the Constitution.

6 *Content of law.* Law is a living thing. It is not static. As circumstances and conditions in a society change, laws are changed to fit the requirements of the society. As such, law prevailing in a society at any point of time must be in conformity with the general sentiments, customs and aspirations of its people. It is a living phenomenon having a real existence in relation to the facts of human affairs.

Need for the knowledge of law

'Ignorantia juris non excusat' is a familiar maxim. This means *ignorance of law is no excuse.* Although it is not possible for a layman to be aware of every branch of law, yet he must acquaint himself with the general principles of the law of the country. This book will familiarise him with general principles of law, constitutional law, law of torts and law relating to transfer of property, arbitration, evidence and some other laws which are of particular importance to people engaged in economic and commercial activities.

The law nowadays is a matter of great intricacy. As such no sound person would attempt to solve important legal questions affecting his personal or business interests without expert legal advice. However, there are certain elements of law which stand out, as it were, like finger-posts, or rather, like danger signals, and indicate where difficulty is likely to arise and where legal advice is desirable. A general knowledge of some of the more important legal principles and how they apply to certain problems will certainly help him in avoiding conflict with the persons with whom he comes into contact, business or otherwise.

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Function and purpose of law

1. *Justice.* The goal of law is 'justice'. In this sense, law is means to an end ; it is not an end in itself. It is an instrument to secure *justice.* It is recognised and applied by the State in the administration of justice which means equal treatment to all situated *alike.* But those not situated alike, like minors compared to adults or women compared to men as regards working hours in factories, may be treated differently and this in no way distracts law from the idea of justice in the sense of equality of treatment. In fact, justice demands a fair treatment to all, keeping in mind different situations and demands of different people.

2. *Continuity and uniformity.* 'Continuity' ensures public expectation in the domain of justice of ascertainable result in future from those obtained in the past unless there is a change in the law of the land. Apart from justice, law also aims at 'uniformity'. In this sense, law should be definite, certain, known and permanent, so that the citizen knows beforehand what the law is and what the consequences of his act shall be. This also ensures *'stability'* and *'security of social order'.*

3. *Impartiality.* Law is necessarily impartial. It treats all like, and is not made for a particular person or for a particular case.

4. *Rule of law.* Another very important function of law is to ensure rule of law. Rule of law is always preferable to rule of men, however eminent and good-intentioned they may be. In India when Emergency was declared in 1974, this was sufficiently and unmistakably demonstrated.

Law is not static

Although origins of law in any society may be traced in antiquity, yet law is not static. As circumstances and conditions in a society change, laws are changed to fit the requirements of the society. As such, law prevailing in a society at any point of time must be in conformity with the general sentiments, customs and aspirations of its people. It is a living phenomenon having a real existence in relation to the facts of human affairs.

In the context of new emerging India, the main object of law is considered to be to establish socio-economic justice and remove the existing imbalance in the socio-economic structure. Law, in this context, has to play a special role in the task of achieving the various socio-economic goals enshrined in our Constitution.

In a society like ours, law has to serve as a vehicle of social change and as a harbinger of social justice. A great part of law is designed principally to bring about all-round welfare and well-being of the citizens individually and collectively from material, moral and spiritual standpoints.

In the pre-Independence era, the principal concern of the government was limited to the maintenace of law and order in the country. But the situation has changed now and the fundamental task of broadening the horizons of the Welfare State is being pursued by the Legistature by enacting social welfare legislations covering the entire gamut of social activity.

CLASSIFICATION OF LAW

Law of the land of a country may be divided into two classes, namely :

1. Public law, and
2. Private law.

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1. **Public law.** It is that law which determines and regulates the organisation and functioning of the State. It also determines the relation of the State with its subjects. The following laws form part of the public law :

(1) *Constitutional law.* It is the basic and fundamental law of the land, which determines the nature of the State and the structure of the Government. It may be written as in India or unwritten as in England.

(2) *Administrative law.* It is the law which deals with the structure, functions and powers of the organs of the Government,

(3) *Criminal law. It* deals with various offences, and has for its object their prevention by providing for and prescribing certain punishments for them.

2. **Private Law.** It is the law which regulates relations of the citizens with one another which are of public importance. In this sense,the State through its judicial organs adjudicates the matters in dispute between them.

Private law comprises the following fields :

(1) The law of persons ;

(2) The law of property ; and

(3) The law of obligations which itself covers within its ambit—

(a) Contracts,

(b) Quasi-Contracts, and

(c) Torts.

SOURCES OF LAW

'Source' means 'origin' from which something is utimately derived and often refers to the causes operating before the thing itself comes into being. Jurists differ widely as to the origin of law. According to Austin, it originates from the Sovereign. Savigny traces its origin in *volkgeist (i.e.,* general awareness of the people) at any point of time. The theologicians attribute its origin to God. The Hindus believe that Vedas, which are a primary source of Hindu law, are a revelation of God. The Mohammedan Law, emanating from Quran, is also believed to have been revealed by God. The sociologists trace the origin of law in numerous complex social factors working over a period of time in any society.

Classification of sources

Salmond divides 'sources of law' into two main classes, *viz.,*

1. Formal sources, and
2. Material sources.

1. **Formal sources.** These are the sources from which the law derives its force and validity. Of course, the only authority from which laws can spring and derive force and validity is State.

2. **Material sources.** The word 'material' is used here in the sense of 'the elements or constituents of which something is composed'. 'Material sources of law' refer to the various processes which result in the evolution of the materials which are the constituents of law. In other words, this refers to the source from which law derives matter or the materials of which it is composed.

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Material sources may be divided into :

(1) Legal sources, and

(2) Historical sources.

(1) *Legal sources.* These are the sources which are recognised by the law itself as authoritative, *e.g.*,

(a) Statute law, having its force in legislations ;

(b) Case law, having its source in precedents ;

(c) Customary law, having its source in customs.

These are the immediate sources law and have an inherent binding force.

(2) *Historical sources.* The sources which have no binding force and which are not recognised by law are referred to as historical sources, *e.g.*,

(a) Juristic writings ;

(b) Literary works ; and

(c) Foreign decisions.

These sources of law may have a great persuasive force but they are not binding law in themselves.

Keeton's classification

Keeton classifies 'sources of law' into :

1. Binding sources, and
2. Persuasive sources.

The '*binding sources*' of law like Salmond's legal sources include statute law, judicial precedents or case law and customary law. The *'persuasive sources'* are like Salmond's historical sources. Keeton's classification, therefore, does not differ from Salmond's classification of material sources of law.

SOURCES OF INDIAN LAW

The modern Indian law is closely modelled on the English pattern and the bulk of the Indian law is based on the English law. There is an obvious historical reason for it. While administering this country, the British rulers applied in most of the cases their own laws. They also applied the personal law of the parties whenever disputes relating to private relationships of the parties arose. A detailed historical study is beyond the scope of this book. However, the main sources of Indian law are as follows :

1. English Law,
2. Customs or customary law,
3. Judicial decisions or law by precedents,
4. Statute law or legislation,
5. Personal law of the parties, *e.g.*, Hindu law or Mohammedan law.

1. ENGLISH LAW

The most important source of the Indian Law is the English Law which is composed of :

(1) Common Law of England, or simply Common Law,

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(2) Equity, and

(3) Statute Law.

(1) Common Law of England

The chief source of the English Law is Common Law as supplemented by Equity and Statute Law.

Meaning. The expression 'Common Law of England' conveys those unwritten legal doctrines embodying English customs and English traditions which have been developed over centuries by the English Courts. It is unwritten. It is the basis of the English Law and is of considerable antiquity.

Customs and usages. Before the Norman Conquest, the traditional or customary law was applied by local Courts, each district having its own local customs and usages. There was no law common to the whole of England. After the Norman Conquest, the King's Courts (called *Curia Regis*) were established and administration of justice was centralised. The local customs and usages were gathered together by the judges of the King's Courts during the reign of Henry II and his successors and applied throughout the country ; these customs and usages thus became the Common Law, *i.e.*, a body of law common to the whole of England.

By the middle of the 13th century, the Common Law came to be administered in 3 Courts, *viz.*, the King's Bench, the Common Bench (or the Court of Common Pleas) and the Exchequer.

Modified by Statute Law. From time to time the Common Law has been modified by Statute Law, particularly to provide for new situations for which the Common Law has no remedy and to alter the existing law where changed circumstances have made it inadequate.

Hardship in many cases. The Common Law was found to work hardship in many cases. It did not always provide an adequate remedy to an injured party. Quite often, the injured party was interested not in money damages but in the specific performance of the contract (*i.e.*, performance of the contract as originally agreed). Moreover, the Common Law could not meet all the needs of changing times. In Equity Law (or just Equity) means were found of ameliorating the harshness of the Common Law.

(2) Equity

Synonymous with justice. The term 'equity' has its origin in the Latin word '*aequitas*' which means 'fair' or 'justice according to natural law' or 'right' or simply 'natural justice'. This is the literal meaning of the term 'equity'. In its technical sense, it means a body of legal doctrines and rules emanating from the administration of justice, developed to enlarge, supplement or override a narrow rigid system of existing law of the land. In that sense equity, in its true and genuine meaning, is the soul and spirit of all law and is synonymous with justice.

Equity developed as a separate branch of law. From the 14th century onwards, the main defects of the Common Law had been remedied by Equity. Equity developed as a separate branch of law which was administered in Chancery Courts. The Common Law Courts only enforced the customs of the realm and the Acts of Parliament. In many cases even when a wrong had been done to a person and his rights encroached upon, he did not have remedy at Common Law. In many other cases, the remedy provided was not adequate.

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In such cases, Equity covered the deficiencies of Common Law and came to the rescue of the aggrieved party.

King's Prerogative and Lord Chancellor. Thus if a person could not get redress for a grievance at Common Law, he could petition for relief to the King in Council. In the beginning the King who was the ultimate 'fountain of justice' used to hear these petitions himself and exercised his extraordinary judicial powers known as the King's Prerogative. Then because of other preoccupations, the King referred the petitions to his Lord Chancellor, known as "Keeper of the King's Conscience". The exercise of powers by the Chancellor was discretionary and the concept of conscience, therefore, varied with each succeeding Chancellor. This imported uncertainty into Equity and prompted Seldon to remark that "Equity is a roguish thing. Equity is according to the conscience of him that is Chancellor; as that is larger or narrower, so is equity."

Court of Chancery. In the 15th century a speical Court, called the Court of Chancery, was set up under the direction of the Lord Chancellor to deal with the petitions whose number had considerably increased. This Court was independent of the King and his Council. At first the Chancellor decided the petitions according to his own ideas of equity but in course of time a set of principles based on 'justice, equity and good conscience' were evolved. These rules which came to be known as rules of equity and which were applied in each case mitigated the rigours of the Common Law.

Equity is also unwritten. Equity, like Common Law, is also unwritten and it grew as a system of law supplementary to Common Law. It alleviated the sufferings of many a petitioner and enforced new remedies for the enforcement of Common Law rights, like specific performance of contracts and injunction. The legal rules applying to trusts, partnerships and mortgages also had their origin in equity.

Both Common Law and Equity continued to be administered in Common Law Courts and Chancery Courts respectively for many centuries.

Clash between Common Law and Equity—Judicature Acts of 1873 and 1875. Clashes inevitably occurred between the systems of Common Law and Eauity. For example, Common Law Courts could award only damages but not order for specific relief, Chancery Courts could order for specific performance but could not award damages. The distinction between them was abolished by the Judicature Acts of 1873 and 1875, so that the Common Law and Equity are now applied side by side to any case in the same Court. These Judicature Acts of 1873 and 1875 reorganised the structure of the Courts and created a new Supreme Court of Judicature. The Supreme Court consists of the High Court of Justice and the Court of Appeal. The High Court, for the sake of convenience, is divided into 3 divisions, *viz.*,

(1) The Queen's Bench Division (which mainly deals with matters which were formerly within the jurisdiction of the Common Law Courts) ;

(2) The Chancery Division (which has taken over the work of the former Court of Chancery) ; and

(3) The Probate, Divorce and Admiralty Division.

The Judicature Acts also provide that where there is a conflict between the rules of Common law and the rules of Equity with reference to a particular matter, the rules of Equity shall prevail.

Divisions of Equity jurisdiction. Equity as administered by the Court of Chancery operated in 3 main directions :

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1. *Exclusive jurisdiction.* The exclusive jurisdiction covered cases where no relief whatever was afforded by the Common Law, *e.g.*,

(a) Rights of persons claiming under trusts ;

(b) Rights of married women in relation to property given to them for their separate use ; and

(c) Administration of assets of a testator (one who leaves a will) and an intestate (one who dies without having made a will).

2. *Concurrent jurisdiction.* This comprised cases in which the Common Law recognised certain rights but did not afford adequate relief. For example, in case of a breach of contract, the Common Law remedy was to award damages. In some cases this legal remedy worked hardship or was inadequate. Equity intervened here and introduced the additional remedy of specific performance and injunction.

3. *Auxiliary jurisdiction.* The auxiliary jurisdiction of Equity was so called because it was exercised in aid of the Common Law. In the exercise of this jurisdiction, the Court of Chancery merely assisted the parties in the effective exercise of legal remedies to enforce their legal rights.

(3) **Statute Law**

It refers to Acts of Parliament. The Statute Law refers to the law laid down in the Acts of Parliament. All Acts of Parliament are recorded in its Statute book from which the term Statute Law derives its name. Unlike Common Law which is unwritten, Statute Law is written. Salmond prefers to call Statute Law as Enacted Law. According to him, "Law that has its source in legislation may be most accurately termed *enacted law*, all other forms being distinguished as *unenacted.*" (Salmond on *Jurisprudence*, 12th ed., p. 116).

The authority of Parliament is supreme. It can, subject to natural limitations and those laid down by the Constitution, pass any law. It can also nullify the decisions of the Courts. Statute Law, therefore, is superior to, and overrides, any rule of the Common Law or Equity. As a matter of fact, many of the deficiencies and inadequacies of Common Law and Equity have been removed by bringing together the existing rules of the Common Law and Equity on a particular topic into a single Statute, thereby making the law manageable. Examples of such codification in the field of mercantile law are the Bills of Exchange Act, 1882, the Partnership Act, 1890, the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, the Bankruptcy Act, 1914, and the Arbitration Act, 1950.

The English Law in its earlier stages of development had also been affected to a marked extent by the Roman Law. A reference was made to the Roman Law when the existing customs and usages failed to afford solution to a particular case. Law Merchant or Maritime usages (discussed below) also played a significant role in nurturing particularly the English Mercantile Law.

Other sources of English Law

The other sources of the English Law are :

(1) **The Law Merchant or *Lex Mercatoria*.** The Law Merchant or *Lex Mercatoria* was the forerunner of the English Law relating to mercantile transactions like negotiable instruments, contracts of partnership, carriage

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and insurance. This branch of law was based to a great extent on customs and usages prevalent amongst merchants and traders of the Middle Ages. When the trade and commerce progressed during this period, there was a continual movement of merchants from place to place and much of the international trade was carried on at fairs. The rather cumbersome procedures of the English Common Law were found to be unsatisfactory in dealing with disputes between merchants because of the following reasons :

(a) The Common Law Courts were inaccessible to merchants who were constantly on the move from one market or fair to another.

(b) The procedures of Common Law Courts were tardy and cumbersome.

(c) The foreign merchants and traders were not acquainted with the local laws.

(d) The Common Law which was based upon feudalism could not in many cases solve the disputes satisfactorily.

The merchants, therefore, developed their own set of rules based on customs and usages to settle their transactions and disputes, if there arose any. These rules came to be known as *Law Merchant.* A bulk of *Law Merchant* owed its origin to English merchants, a part of it to the practices and usages of maritime trade at those times and the Roman Law.

In the initial stages, the Common Law Courts were reluctant to recognise these customs and usages of merchants even though they were regarded as binding between the merchants themselves. The existence of these customs and usages had to be proved as fact in case of doubt.

Gradual absorptions into Common Law. During the 17th and 18th centuries, the law Merchant was gradually absorbed into the Common Law. In a classic judgment *Goodwin* v. *Robarts,* (1875) L.R. 10 Ex. 337, Chief Justice Cockburn explained the exact historical and legal position of the *Law Merchant* when he observed that it is ".....neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of the courts of law, which, upon such usages being proved before them, have adopted them as settled law....By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the Common Law, and may thus be said to form a part of it." This source of Common Law rules is not closed, and as any new custom becomes generally recognised amongst merchants and is proved in the Courts, it becomes part of the Common Law.

In India, the *Law Merchant is* codified, *e.g.,* the Indian Contract Act, 1872, the Negotiable Instruments Act, 1881, the Sale of Goods Act, 1930, and the Indian Partnership Act, 1932. The task of the Courts in India is easier in the sense that they have only to interpret these Statutes. However, where some rule of tne *Law Merchant* is not incorporated in a statute, the Courts in India may apply the English Law on the subject.

(2) **Roman Law.** A reference to Roman Law was made when customs and usages failed to afford solution to a particular case.

(3) **Case Law.** This is also a very important source of the English Law. It is built up on previous judicial decisions or precedents. It is based on the principle that what has been decided in an earlier case is binding in a similar future case, unless there is a change in the circumstances of the case.

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Equity in India

In India there never existed separate equity Courts although equitable principles of law, *i.e.*, justice, equity and good conscience, have been the guiding force behind most of the Statutes in our country and the decisions of the Courts. Equity has considerably influenced the development of law in our country. Particularly when law is silent on any point or there is some lacuna in a Statute, equity comes handy to the judges who exercise their discretion often on equitable considerations. The frequent use of the terms "good faith", "public interest", "public policy" in Statutes and by the Judges is based on principles of equity.

Application of English Law in India

The English Law even though founded on "justice, equity and good conscience", in its application to India, had to conform to the peculiar circumstances and conditions prevailing in the country. Even though the bulk of our law is based on, and follows, the English Law, yet in its application, our Courts had to be selective. Invariably a rule of English Law was followed if it was found applicable to Indian society and circumtances [*Waghela* v . *Sheik*, (1887) 14 I.A. 89, 96]. But on several occasions the Courts refused to apply the rules of English Law if they were found inapplicable to Indian circumstances (*Tagore* v. *Tagore*, (1872) I.A. Supp. 47).

In *Naval Kishore* v. *Rameshwar*, A.I.R., (1985) All. 594, the attitude of the Indian Courts towards the applicability of the English Law was elaborated in the following words :

> "The Courts of this country act on the principle of equity, justice and good conscience in matters which are not covered by Statute and rely upon the principles established under the English Law to find out what the rule of justice, equity and good conscience is. Any technical rule of statutory law of England is not as such considered to be based on the principle of equity, justice and good conscience unless it offers to be so to the judge deciding the case."

In *M.C Mehta* v. *Union of India*, A.I.R. (1987) S.C. 1086, the Supreme Court has very aptly observed :

> "We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order."

This is a landmark case, as the Indian Courts have gone much beyond the horizons of the English Law.

2. CUSTOMS OR CUSTOMARY LAW

A practice followed over a long period of time. In primitive societies, customs used to be the only law that governed the conduct of the people. They developed out of necessity or convenience. When a particular practice was repeatedly followed, it became a custom. Traditionally much of the Common Law of England was based on what had become customary in the country at large, and in this sense custom is the mother of all institutions. As civilisation progressed, customs diminished in value as a further source of law, giving place to judidicial precedents and legislation as the main source of law.

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'Custom', in simple words, means a usage or practice common to many or to a praticular place. It is a long-established practice considered as unwritten law. A particular act, usage or conduct practised by a group of people for a long period becomes a custom. "For where the people find any act to be good and beneficial and apt and agreeable to their nature and disposition, they use and practise it from time to time, and it is by frequent iteration (repetition) and multiplication of this act that the custom is made and being used from time to time which memory runneth not to the contrary obtains the force of law." (*Case of Tanistery*, (1608) Dav. Rep. 32).

According to Salmond, "custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility." In *Harpershad* v. *Sheo Dayal*, (1876) 31 A. 259 (P.C.) their Lordships defined a custom as "a rule which in a particular family or in a particular district or in a particular sect, class or tribe, has from a long usage obtained the force of law."

Holland's illustration. Holland in his classic treatise "Jurisprudence", while defining a custom as " a generally observed course of conduct", gives a beautiful illustration to explain what a custom is. He says :

> "One man crosses the common ground in the direction which is suggested whether by the purpose he has in view, or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made.....Before a custom is formed, there is no juristic reason for its taking one direction rather than another, though doubtless there was some ground of expediency or religious scruple, or of accidental suggestion. A habitual course of action once formed gathers strength and sanctity every year.....There can, in fact, be no doubt that customary rules existed among peoples long before nations or States had come into existence."

Definition of customary law

Customary law may be defined as those rules of human action, established by usage and regarded as legally binding by those to whom the rules are applicable, which are adopted by the Courts and applied as law because they are generally followed by the society as a whole or by some part of it (*Keeton*).

Binding force of customs

Salmond gives the following reasons for attributing to custom the force of law :

1. *Based on principles of justice and public utility.* Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility. The fact that any rule has already the sanction of custom, raises a presumption that it deserves to obtain sanction of law also. The national conscience may well be accepted by the Courts as an authoritative guide ; and of this conscience national custom is the external and visible sign. Custom embodies the principles as acknowledged and approved, not by the power of the State but by the public opinion of the society at large.

2. *Rational expectation of its continuance.* The existence of an established usage is the basis of a rational expectation of its continuance in the future.

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Justice demands that, unless there is some good reason to the contrary, men's rational expectations shall, so far as possible, be fulfilled rather than frustrated. Even if customs are not ideally just and reasonable, even if it can be shown that the national conscience has gone astray in establishing them, even if better rules might be formulated and enforced by the wisdom of the judicature, it may yet be wise to accept them as they are, rather than to disappoint the expectations, which are based upon established practice.

3. *Observance over a long period.* A custom observed by a large number of people over a long period acquires the force of law. Thus the custom of granting 3 days of grace in calculating the date of maturity of bills of exchange has come to have the force of law.

4. *Interest of society.* A custom rests on the popular conviction that it is in the interest of society. This conviction is so strong that it is not found desirable to go against it.

Custom is useful both to the law-giver and people. To the law-giver, it provides the material out of which the law can be fashioned ; it is too bold an intellectual effort to create law *de novo*. Psychologically, it is easier to secure reverence for a code or law, if it claims to be based on customs immemorially observed. Thus, no new legislation can completely ignore the extant (currently existing) practices. To the people, a custom is already known. Its observance over a long period makes its acceptance easier by the people. Further as it has become time-tested, it is known to people and there is less scope of its being overruled.

5. *A great help in the formulation of law.* The existence of a long established custom is great help in the formulation of the law and its acceptance by the people.

Kinds of customs

Customs are divided into 2 classes, *viz.*,

1. Legal customs, and
2. Conventional customs or usages.

1. *Legal custom.* A legal custom is one whose legal authority is absolute and which possesses in itself the force of law. It is recognised by the Courts and is a part of the law of land.

Legal custom may be of 2 kinds, *viz.*,

(a) Local custom, and

(b) General custom, and

(a) Local custom. A local custom is one which prevails in some defined locality only, *e.g.*, a town or a district. It constitutes a source of law for that place only. Every custom is in some fundamental respect an exception from ordinary law of the land. Moreover, it is limited in its application. It does not apply to the generality of citizens but only to a particular class of persons or to a particular place.

A custom in its narrowest sense means only a local custom.

(b) General custom. A general custom is one that prevails throughout the territory of the State. It is part of the law of the land. In England, the general custom of the land is known as the Common Law of England. Whereas local

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custom prevails in a particular local area or in a particular community, general custom is the law of the whole country.

2. *Coventional custom.* A conventional custom is one whose authority is dependent upon prior acceptance by the parties sought to be bound by it. It is usually referred to as *usage.*

A conventional custom or usage is binding not due to any legal authority independently possessed by it but because it has been expressly or impliedly incorporated in a contract between the parties. It need not have existed from time immemorial. It applies to a particular trade, business, profession or occupation and not to a locality. A usage must be certain, generally known, reasonable and not inconsistent with any positive rule of law. The usual effect of a usage is to annex certain terms and provisions to any contract made between persons affected by it, or attach particular meanings to terms used in these contracts.

Custom and usage

Custom (or legal custom) must be distinguished from usage (or conventional custom) :

1. A custom is binding irrespective of the consent of the parties to be bound thereby. A usage is binding only when it is not expressly excluded by the terms of the agreement entered into by the parties.

2. A custom to be valid must have endured from time whereof there is no memory. A usage need not have existed from time immemorial. No specified duration is legally necessary, nor is any distinction drawn between ancient and modern usage. A usage of recent origin can also be given effect to by a Court on the ground that the parties had contracted with reference to that usage.

Requisites of a valid custom

In order to be valid and have a binding force as a law, a custom must have following requisites :

1. *Immemorial antiquity.* A custom to have the force of law must have existed for "so long that the memory of man runneth not to the contrary. So that if any one can show the beginning of it, it is no good custom". This is the rule of English Law. In England, this legal memory is presumed to go back to the year 1189, the first year of the reign of Richard I. If a custom was in existence at that time, it is a valid custom. In India, antiquity is essential for the recognition of a custom, but the rule of English Law as to legal memory has no application, *i.e.,* there is no fixed period for which a custom must have been in existence. In *Baba Narayan* v. *Saboosa,* (1943) 2 M.L.J. 186, it was observed : "In India, while a custom need not be immemorial, the requirement of long usage is essential since it is from this that a custom derives its force as governing the parties' rights in place of the general law."

2. *Reasonableness.* A custom must be reasonable. *i.e.,* it must not be repugnant or contrary to reason. It is repugnant or contrary to reason if it is opposed to the principles of justice, equity and good conscience. And whatsoever is not against reason may well be admitted and allowed.

The time to decide reasonableness of a custom is the time of its origin, taking into account the general principles which are at the root of the legal system.

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3. *Continuous obervance.* A custom to be vaild must have been practised continuously from time immemorial and there should have been no interruption in its continued observance. A custom is interrupted if between acts based on it, other acts based on contrary rule occur.

4. *Conformity with Statute law and public policy.* A custom must not be contrary or opposed to Statute law, public policy and morality. Where it conflicts with the Statute law, it is automatically abrogated. For example, the custom of *Sati* in Rajasthan cannot be regarded as law as it is against Statute law, public policy and morality.

5. *Certainty.* A custom must be certain and definite. It must exist as a matter of fact. If it is vague or uncertain, what then is the Court to enforce ? For example, a custom to pay Rs. 200 in tax per acre is good ; but to pay sometimes Rs. 200 and sometimes Rs. 300 as the occupier pleases is bad for uncertainty.

6. *Consistency.* Customs should be consistent with one another. If a custom comes into conflict with some other established customs, it is not a valid custom. Likewise, if it is inconsistent with the general principles of law it would not be given effect to by the law Courts.

7. *Obligatory force.* A custom must have an obligatory force. It must be supported by the general public opinion. If a practice is left to individual choice, it has no obligatory force and it cannot be termed as custom. It must be universal or nearly so. In the absence of unanimity of opinion, a custom becomes powerless or rather does not exist.

8. *Peaceable enjoyment.* The custom must have been enjoyed peaceably without any dispute in law Court or otherwise.

A custom is thus law if it embodies the above requisites.

3. JUDICIAL PRECEDENTS

Doctrine of *stare decisis*

Precedent means something done or said that may serve as an example or rule to authorise or justify a subsequnet act of the same or a similar kind.

Adhering to earlier decisions. Judicial precedents are an important sourcess of law based on the principle that what has been decided in an earlier case is binding in a similar future case, unless there is a change in the circumstances. Both English Courts and Indian Courts follow the decisions given in their previous decided cases within more or less well-defined limits. This is called the *doctrine of precedents* or *doctrine of stare decisis* which means adherence to the earlier decision and not unsettling things which are already established. The doctrine of *stare decisis* is based on expediency and public policy. A departure from settled law should be made only if the interpretation accepted as good for long years results in a grievous wrong [*Dwarka Singh* v. *Deputy Director of U.P., Mainpuri*, A.I.R. (1981) NOC 105 All.]. To that extent the doctrine is not rigid and must not be applied at the cost of justice.

The importance of judicial precedents has always been a distinguishing characteristic of the English Law. The Common Law of Englad owes much of its development to the system of judicial precedents. In practice, if not in

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theory, the Common Law of England has been created by the decisions of English Judges.

The doctrine of precedents has been decisively established in Indian jurisprudence. Judgments delivered by the superior Courts are regarded as much a part of the law of the country as legislative enactments. As to the continuance of the system of precedents, the Law Commission of India (1958) examined that the system was so bound up with the growth of law and judicial development in India that it was not practicable to go back upon it at the present stage. The Commission also expressed the view that the system of treating decided cases as a source of law and as binding authority had undoubted advantages (*Report of the Law Commission of India, 1958, p. 628).*

In India, though a large portion of law is codified, the practice of following precedents is as much prevalent as in England.

Role of Judges

In the earlier stages, the Courts while administering justice were guided by the prevailing customs and their own skill and sense of justice. With the passage of time, 'legislation' became the most important source of law. When a law at any point of time is made, all the social, economic and political conditions prevailing at that time and the aspirations of the people are taken into account. It is the judges who interpret and decide the cases according to the law prevailing in the country.

Judges fill the lacuna. Sometimes, with the change of circumstances and conditions in the society, some peculiar situation or point not contemplated by law may arise. In such a case the judge has to fill the lacuna ; he has to decide the case according to the best of his judgement under the changed circumstances. The decisions on such points expressed for the first time become precedents to be followed as law in deciding subsequent cases of similar nature. A large part and the best part of the Law of England is Judge-made law.

Why precedents are recognised ?

In favour of the practice of binding nature of precedents, it is said that the practice of following precedents is necessary to secure the certainty of law and predictability of decisions. Further this creates confidence in the minds of the litigants and the administration of justice becomes fair. In *Keshav Mills Co. Ltd.* v. *Commr. of Income-tax,* (1965) 2 S.C.R. 908, it was observed by Gajendragadkar, C.J.: "It must be the constant endeavour and concern of this Court (Supreme Court) to introduce and maintain an element of certainty and continuity in the interpretation of law of this country. Frequent exercise by this Court of its power to review its earlier decisions on the ground that the view expressed before it later appears to the Court to be more reasonable, may incidentally tend to make law uncertain and introduce confusion which must be consistently avoided."

Hierarchy of Courts

The general rule of doctrine of precedent as regards hierarchy of Courts is that each Court is absolutely bound by the decisions of the Courts superior to it. As regards higher Courts, they are, to a certain extent, bound by their own decisions.

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Supreme Court. This is the highest Court in India. Its decisions are binding on all Courts within the territory of India (Article 141 of the Constitution of India). If on a subsequent occasion the Court is satisfied that its earlier decision was clearly erroneous, it may "correct the error, but before a previous decision is pronounced to be plainly erroneous, the Court must be satisfied with a fair mount of unanimity amongst its members that a revision of the said view is fully justified" [*Keshav Mills Co. Ltd.* v. *Commr. of Income-tax*, (1965) 2 S.C.R. 908]. Further the decisions of the Full Bench are binding on the smaller Benches of the Court.

In *Golaknath* v. *State* A.I.R. (1967) S.C. 1643, the Supreme Court by a 6-Judge Bench gave a decision that Fundamental Rights are not amendable. Six years later, the Supreme Court in *Kesavananda Bharti* v. *State of Kerala*, (1973) S.C.C. 225 by a 13-Judge Bench overruled the *Golaknath Case.*

High Courts. (a) In States, there are High Courts. The decisions of a High Court are binding on all the Courts below it within its jurisdiction.

(b) The decisions of one High Court are not binding on other High Courts, although in practice they are cited in other High Courts. These decisions, therefore, have only a persuasive value, but quite often, High Courts follow the rulings of each other on the ground of judicial uniformity, specially in the case of Central Acts.

(c) The appeals in High Courts are generally heard by a single judge. If the appeal involves a substantial or important point of law, it is referred to 2 judges (who constitute the Division Bench) or to a larger number (constituting a Full Bench). The decisions of a larger bench are binding on a smaller bench.

Subordinate or District Courts. These Courts are in districts. They are bound to follow the decisions of the higher Courts.

Kinds of precedents

Precedents may be classified into 2 broad groups :

1. Declaratory and original precedents, and
2. Authoritative and persuasive precedents.

1. *Declaratory and original precedents.* The decisions of judges, called precedents, are of 2 kinds, *viz.*,

(i) Those that merely apply existing rules of law, and

(ii) Those that create an entirely new principle.

A precedent that is merely the *application of existing rules* of law is called a *declaratory precedent.*

A precedent that creates and applies a *new rule of law* is called an *original precedent.* This precedent becomes law for the future. The original precedents are fewer in number but their importance lies in the fact that they develop the law of the country and save it from degenerating into stagnation.

The legal authority of original precedents is as good as that of declaratory precedents, and both are a good source of law.

2. *Authoritative and persuasive precedents.* An authoritative precedent is one which judges must follow whether they approve of it or not. Authoritative precedents are a legal source of law. They are the decisions of superior Courts of Justice which bind the hierarchy of Courts in a country in a particular order.

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A persuasive precedent is one which the judges are under no obligation to follow but which they will take into consideration, and to which they will attach such weight as it seems to them to be proper. Unlike authoritative precedents, they are merely historical sources of law. Among the persuasive precedent are the following :

(a) Decisions of one High Court *vis-a-vis* the other High Courts ;

(b) Foreign Judgments ;

(c) *Obiter dicta* (explained on next page).

(d) Authoritative text-books and commentaries.

This distinction between persuasive and authoritative precedents may pose difficulties by the fact that a percedent may be binding upon some Courts whereas it may be persuasive in others.

Authoritative precedents may be :

(1) Absolutely authoritative precedents, or

(2) Conditionally authoritative precedents.

(1) *Absolutely authoritative precedents.* When a precedent is absolutely binding and the Judge's discretion is altogether excluded (and the test is that he is helpless even where he feels that the precedent is erroneous or unreasonable), the precedent is said to be absolutely authoritative. For example, every High Court in India is absolutely bound by the decisions of the Supreme Court. A single judge of a High Court is absolutely bound by the decision of a Division Bench or a Full Bench.

(2) *Conditionally authoritative precedents.* If an authoritative precedent is binding on the Court to which it is cited but may be disregarded by the Court in certain circumstances, it is called a conditionally authoritative precedent. Whether a precedent is absolutely or coditionally authoritative will depend upon the Court to which it is cited. For instance, the decision of a single Judge of a High Court is absolutely authoritative so far as District Courts are concerned but is only conditionally authoritative if it is cited before a Division Bench of the same High Court.

Disregard of precedents

A Court may disregard a precedent either by :

(1) overruling it, or

(2) refusing to follow it or dissenting from it.

A precedent can be overruled only by a Court of superior jurisdiction. For example, a decision of a High Court can be overruled by the Supreme Court. When a precedent is overruled, it is an authoritative declaration that it is wrong. It then becomes null and void and cannot be followed by the Courts in future. A Court cannot overrule a decision of a Court of coordinate jurisdiction (*i.e.*, equal in rank and authority, *e.g.*, 2 High Courts) ; it may only refuse to follow it or dissent from it.

When a Court 'dissents' from a precedent, it lays down new rules of law. When 2 Courts of coordinate jurisdiction differ with each other, the conflict can be resolved only by a superior Court. Till this is done, the law remains uncertain.

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Ratio Decidendi, obiter dictum* and *precedents sub silentio

Ratio decidendi. A decision of a Court can be seen from 2 aspects, *viz.*,

(1) What does the case decide between the parties ? and

(2) What principle or rule of law does it lay down ?

What the case decides between the parties is conclusive between those parties and is of immediate concern to them. As against persons not parties to the suit, the only part of the case which is conclusive is the general rule of law, for which it is authority. This rule of law or the underlying principle upon which the decision is founded and which gives it the element of authority is the *ratio decidendi.*

Obiter dictum. It means an incidental or collateral opinion which is uttered by a judge while delivering a judgment and which is not binding. It is a mere saying by the way, a chance remark, which is not binding upon future Courts, though it may be respected accordidng to the reputation of the judge, the eminence of the Court and the circumstances in which it came to be pronounced. Salmond observed in this regard."Indeed, *dicta* of the House of Lords or the Judges who are masters of their field like Lord Balckburn, may often in practice enjoy greater prestige...." (*Jurisprudence*, 12th ed., p. 177).

Ratio decidendi and *obiter dictum* can be best illustrated by means of a case. Sec 13 (1) *(ia)* of the Hindu Marriage Act, 1955 provides that cruelty after marriage can be one of the grounds for divorce between the spouses. The Section uses the words "treated with cruelty", and nowhere defines what amounts to cruelty. In a landmark case *Dastane* v. *Dastane*, A.I.R. (1970) Bom. 312, the Court held that "acts or conduct constituting cruelty can be so numerous and varied that it would be impossible to fit them into any water-tight compartments. Cruelty may be subtle or brutal, it may be physical or mental." This is a principle of law laid down in this case which is the *ratio* of the case and has hence been used as precedent in many following cases. The rest as to what constituted mental cruelty—the false accusations, the abuses, the misery and the humiliation etc. are the *obiter dictum*

The reason for not regarding an *obiter dictum* as binding is that it was probably made without a full consideration of the cases on the point, and that if it is very broad in terms, it was probably made without a full consideration of all the consequences that may follow from it.

The *ratio decidendi* is the rule acted on by the Court ; *obiter dictum* has only a persuasive value and is suggestive of the trend of the Court's thinking.

Precedents sub silentio. This means that if a point is not raised in a case (even though the facts enabled it to be raised), a precedent on that point is not an authority or at any rate not a binding authority.

4. LEGISLATION

The term 'legislation' is used in different senses. In a wide sense, it includes all methods of law-making and, therefore, would include laws made by judges also. In the strict sense, it may be defined as the promulgation of legal rules by an authority (*e.g.*, Parliament or a State Legislature) which has the power to do so.

In modern times, 'legislation' is the most important source of law in all countries.

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Jus scriptum and jus non scriptum. The written law was called by Romans as *jus scriptum* (whether it had its source in legislation or not. *i.e.*, whether it was enacted or unenacted), and the customary law as *jus non scriptum* (unwritten law). The former term was used commonly for law that had its source in legislation and not elsewhere. This usage however is not right. As suggested by Salmond, such law may be most accurately termed as enacted law. This avoids confusion. In India, bulk of the law dealing with various aspects of law is enacted by the Legislature, for example, the Indian Penal Code, 1869, the Indian Succession Act, 1865, the Indian Contract Act, 1872, the Indian Negotiable Instruments Act, 1881, the Transfer of Property Act, 1882, the Indian Sale of Goods Act, 1930, the Indian Partnership Act, 1932, the Indian Arbitration Act, 1940.

Supreme and subordinate legislation

Legislation is either supreme or subordinate.

Supreme legislation. Legislation is said to be supreme when it proceeds from the supreme or sovereign power in the State and is incapable of being repealed, annulled or controlled by any other legislative authority. In India, subject to certain natural limitations and constitutional restrictions, Parliament is supreme and the legislation proceeding from it is also supreme. By this test, legislation emanating from British Parliament in England and from Congress in the U.S.A. is also supreme legislation.

Subordinate legislation. Legislation is said to be subordinate when it proceeds from any authority other than the supreme or sovereign authority in the State. It is made under the powers delegated to it by the supreme authority. It depends for its continued existence and validity on some superior or supreme authority.

There are 5 forms of subordinate legislation :

(1) *Colonial.* The laws of the countries which are not independent or which are under the control of some other State, are subject to the supreme legislation of the State under whose control they are. The power of the local legislatures is derived from and controlled by the ruling power.

(2) *Executive.* The rule-making power under most of the Statutes is conferred on the executive (*i.e.*, the branch of the government that executes the laws or runs the administration). This is because Statutes today cannot cope with all the details that may be involved in their implementation. The rules made under a Statute are delegated legislation and have a force of law.

(3) *Judicial.* The judiciary has powers to frame rules for the regulation of their procedures and administration.

(4) *Municipal.* Municipal bodies are delegated powers by the Act which brings them into existence to frame rules and by-laws for the area under their jurisdiction for carrying on various activities entrusted to them.

(5) *Autonomous.* The autonomous bodies, like universities, are given power by the State to make rules and by-laws for their administration. These rules and by-laws are recognised and enforced by Courts of law. This power is given for the sake of convenience.

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Direct and indirect legislation

Legislation is direct when the sovereign authority (*e.g.*, Parliament in India) itself makes the law. When the sovereign authority delegates power to any other authority to make laws or frame rules and that authority makes some laws or frames some rules, such legislation is called indirect legislation. All subordinate legislation is indirect legislation.

5. PERSONAL LAW

Sometimes a point at issue between the parties to a dispute is not covered by any Statute or custom. In such cases, the Courts are required to apply the personal law of the parties. This practice was adopted in India during the early British Rule. As early as 1793, the Cornwallis Code provided that in suits regarding succession, inheritance, marriage, caste and all religious usages and institutions, the Hindu laws with respect to Hindus and Mohammedan laws with respect to Mohammedans, were to be considered to be the general rules by which the judges were to form their opinions and decide disputes. It was further enacted in 1795 that where the parties belonged to different religions, the law of the defendant was to be applied. If the defendant happened to be a European or non-Hindu or non-Mohammedan, the law of the plaintiff was to be applied. But with change in conditions, some of the personal laws of Hindus and Mohammedans were amended. After Independence, this process has been further accelerated with a view to bring about social reforms.

Sources of Hindu Law. In the case of Hindus, their personal law is contained in—

(1) *The* 'Shruti" *(i.e.*, what is heard). This is the direct word of the deity heard by the sages. This includes the four Vedas (*viz.*, Rig Veda, Yajur Veda, Sama Veda and Atharva Veda).

(2) The *'Smriti' (i.e.*, what is remembered). These are the teachings and precepts of God passed on by the sages to the succeeding generations. There are 3 main Smritis : the codes of Manu, Yajnanavalkya and Narada.

Hindus are governed by their personal law as modified by Statute law and custom in all matters relating to inheritance, succession, marriage, adoption, coparcenery, partition of joint family property, guardianship, maintenance and religious and charitable endowments.

The Statutes codifying Hindu law enacted in post-Independence era include :

(1) The Hindu Marriage Act, 1955,

(2) The Hindu Succession Act, 1956,

(3) The Hindu Minority and Guardianship Act, 1956, and

(4) The Hindu Adoptions and Maintenance Act, 1956.

The objects achieved by these Statutes are :

(a) substantial unification of Hindu law by blending much that was progressive in the various schools of law which prevailed in the different parts of the country ; and

(b) removal of many anomalies and incongruous injunctions.

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Sources of Mohammedan Law. The personal law of Mohammedans is to be found in the following :

1. The *Koran*, representing the voice of God. This is the paramount authority of the Mohammedan Law.

2. The *Hadis, i.e.*, the actions, the precepts and sayings of the Prophet Mohammed.

3. *Ijma, i.e.*, a concurrence of opinion of the companions of Prophet Mohammed and his disciples provided it is not against the *Koran* or the *Hadis*.

4. *Qaiyas* or reasoning by analogy.

5. *Digests and commentaries on Mohammedan Law, e.g.*, the *Hiddya* (12th century) and the *Fatwa Alamgiri* (compiled by command of the Mughal Emperor, Aurangzeb).

Mohammedans are governed by their personal law as modified by Statute law and custom in all matters relating to inheritance, succession, wills, legacies, marriage, dower, divorce, gifts, wakfs, guardianship and pre-emption.

In order to regulate the functioning of the Wakfs (charitable trusts created according to the rules of Mohammedan Law), the Wakf Act, 1954 was passed.

The Muslim Women (Protection of Rights on Divorce) Act, 1986 protects the rights of Muslim women who have been divorced by, or have obtained divorce from their husbands and provides for matters connected therewith.

The Special Marriage Act, 1954 and the Miscellaneous Personal Laws (Extension) Act, 1959, amend both Hindu and Mohammedan Laws.

In the absence of any rule of specific law, usage or custom, or personal law on a particular point arising before the Courts, the Courts apply the doctrine of "justice, equity and good conscience' which means " in substance and in circumstances the rules of English Law" applicable to Indian society and circumstances.

TEST QUESTIONS

1. Enumerate the principal sources of Indian Law. *(C.S.E. December 1992)*

2. Discuss how far are judicial decisions a source of law.

3. How far is a 'custom' source of law ?

4. What are the requisites of a valid custom ? *(C.S.E., June 1987, December 1990)*

5. Custom is a source of law provided it satisfies certain minimum requirments." Elucidate. *(C.S.E. June 1991)*

6. Write a note on sources of law. *(C.S.E. December 1987)*

7. If a judicial pronouncement contains observations on possibilities *(obiter dicta)* but not arising out of the case decided, can they be considered to be part of the case law ?

8. *(a)* Distinguish between binding precedents and persuasive precedents.
   (b) Examine the significance of an *obiter dictum.*

9. Examine the nature of judicial precedents in India with reference to decisions of *(a)* Supreme Court, and *(b)* High Courts of States.

10. "The basic rule of the doctrine of precedent is that the decisions of the higher Courts must be followed by the Courts subordinate to them." *(C.S.E. June 1992)*

11. Discuss the circumstances under which the binding force of precedent is destroyed or weakened.

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12. Distinguish between statutory law and customary law.

13. How far is the personal law of the parties applicable today in India ?

14. What are the sources of English law ?

15. What are requisites of a valid custom? *(C.S.E. December 1988)*

16. Discuss precedents as a source of law. *(C.S.E. June 1988, June, 1993)*

17. Discuss legislation as a source of law. *(C.S.E. June 1989)*

18. Explain briefly the doctrine of *stare decisis*. *(C.S.E. December 1989)*

19. Explain the doctrine of '*stare decisis*'. How do you distinguish between '*ratio decidendi*" *and 'obiter dicta' ?* *(S.C.E. December 1986)*

20. Expalin the terms *ratio decidendi* and *obiter dicta*.

(C.S.E. December 1987, December, 1990)

21. Write short notes on :

(1) *Obiter dicta*. (2) Precedent Law. (3) Law Merchant. (4) Declaratory and Original Precedents. (5) Absolute and Conditional Precedents. (6) Common Law of England. (7) Material Sources of Law. (8) Divisions of Equity Jurisdiction. (9) Customary Law. (10) *Ratio Decidendi*.

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2

Law of Torts

PART I—GENERAL PRINCIPLES

According to 'Law of Contract' if a party to a contract does not fulfil his obligation under the contract, he commits a wrong. One of the remedies available to the aggrieved party at law in such a case is damages.

A *wrong may be independent of an agreement.* For example, suppose *M*, a motorist, while driving his car negligently, knocks down *C*, a cyclist, on the road and breaks his leg. Or *M*'s dog attacks *C*, a neighbour, who is badly injured. In both these cases *C* can claim compensation from *M*. The accident gives rise to an action for damages and the liability of *M* is independent of any agreement or contract. This action is based not on a breach of agreement but on a civil wrong or tort.

Origin of word tort. Etymologically, the word 'tort', a French word, signifies any wrong. The word had its origin in the Latin words *'tortus' or 'tortum'* which means 'twisted' or 'wrung'. The word 'wrung' and 'wrong' have the same origin. Nowadays a tort is not any wrong but only a particular kind of wrong, *i.e.*, a civil wrong as opposed to a criminal or public wrong. A civil wrong, also known as private wrong, is a wrong against an individual, *i.e.*, an infringement of some private or civil right belonging to that individual. Public wrongs are a breach and violation of public rights and duties which affect the whole community and are thus offences against the State.

The law of torts is concerned with only civil wrongs.

LAW OF TORTS IN INDIA

The law of torts, both in England and in India, is not codified. It is mainly based on judicial decisions.

The law of torts in India is based on the English Law of torts. The Indian Judges have adopted the English Law in this regard in consonance with the principles of equity, justice and good consicence. They depart from the English Law only when it is wholly unacceptable and unsuitable to local social conditions or when it is not applicable to India on equitable grounds.

The law of torts in India is still in its infancy stage. Contribution of Indian cases to its development is very meagre. The reasons for it are not far to seek. People in India are generally not conscious of their rights. Even when they are, and there is a violation of their rights, they are in no position to seek or do not seek a legal redress because of poor economic condition, high cost of litigation, delay in the disposal of cases, influence of Panchayats in villages, and their spirit of tolerance.

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Apart from these factors, even if a litigant goes to the Courts for redressal, the attitude of the Courts is also not very encouraging. Further the damages that are awarded are also very low.

Some of the Acts in India which deal with certain aspects of law of torts are :

1. The Fatal Accidents Act, 1855 ;
2. The Carriers Act, 1965 ;
3. The Patents and Designs Act, 1911 ;
4. The Workmen's Compensation Act, 1923 ;
5. The Specific Relief Act, 1964, etc.

The first attempt in India in the direction of codifying civil wrongs was made in 1886, when Sir Frederick Pollock prepared a bill known as "The Indian Civil Wrongs Bill". This, however, did not find favour with the then Government and it could not become law. The first report of the First Law Commission on "liability of the State" dated May 11, 1956 is still awaiting implementation. A bill based on recommendations of the Law Commission was introduced in the Fourth Lok Sabha (1967-71). The bill, however, lapsed with the dissolution of the Lok Sabha in 1971.

NATURE AND DEFINITION OF TORT

Definition of tort

No definition of tort which is "at once logical and precise" has been possible. The law of torts is based on decided cases and the different wrongs included in tort are of different historical background. Moreover, law of torts is still growing and hence an all embracing definition cannot be provided.

Sec. 2 *(m)* of the Limitation Act, 1963, however, attemts to define a tort. According to it, "tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

We shall examine the following definitions given by two eminent jurists on jurisprudence :

Salmond : "Tort is a civil wrong for which the remedy is a common law action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of trust or other merely equitable obligations."

Winfield : "Tortious liability arises from the breach of a duty primarily fixed by the law : this duty is towards persons generally and its breach redressible by an action for unliquidated damages."

The person committing the tort is called the *tort-feasor.*

From the above definitions the following important points emerge :

1. Tort is a civil wrong as opposed to a criminal wrong.
2. Every civil wrong, *e.g.*, a breach of contract or a breach of trust, is not a tort.
3. It (tort) results in the infringement of a right *in rem* conferred by law.
4. The remedy for the person aggrieved by it (tort) is an action for unliquidated damages, *i.e.*, the damages which are to be determined by the Court.

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The nature of a tort may be explained by distinguishing between :

1. Tort and crime.
2. Tort and breach of contract.
3. Tort and quasi-contract.
4. Tort and breach of trust.

Tort and crime. The term 'crime' is applicable to acts (and omissions) amounting to an offence for which law awards punishment. A 'tort' may be distinguished from a crime as follows :

(1) *Nature of wrong.* Tort is a private wrong whereas crime is a public wrong. Private wrongs are infringement of the civil rights which belong to individuals, public wrongs or crimes are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity.

(2) *Nature of remedy.* In a tort, the remedy is a suit for damages in a Civil Court. For a crime, the remedy is punishment of the accused by the State.

(3) *Parties to the suit.* In a tort the injured party has himself to file a suit for compensation as a plaintiff. In the case of a crime, the proceedings are brought by, and conducted, in the name of the State.

(4) *Withdrawal of suit.* In a tort, the injured party may at any time withdraw the suit and compromise with the wrong-doer. In a crime, except in certain exceptional cases, the compounding of an offence, as a general rule, is not permitted.

(5) *Application of law.* The crimes in India are dealt with under the Indian Penal Code, 1860. There is no separate Statute dealing with torts as such. The law of torts is based mostly on judicial decisions.

(6) *A crime in one country may be a tort in another country.* What is a crime in one country may be only a tort in another country. Thus if *A* has adulterous relations with *B*'s wife with her consent, it is only a tort in England but a crime in India. Again what is a crime today may become a tort tomorrow and *vice versa*. "The law is like apparel which alters with time."

(7) *Survival of action.* In the case of a crime, the death of the offender puts an end to the prosecution. In the case of death of a tort-feasor (the person committing the tort), his legal representatives can be sued except when the tort is defamation, assault or personal injury not causing death.

(8) *Limitation.* There is generally no bar of limitation to a prosecution for a crime, whereas limitation is a bar to an action in tort.

Sec. 468 of the Code of Criminal Procedure, 1973 has, however, put a bar of limitation in taking cognizance of certain categories of crimes.

Sometimes a wrong may be both a tort and a crime as, for example, assault, libel, nuisance, theft, mischief to property, etc.

Examples. (a) A assaults *B*. In this case, *B*'s right of bodily safety is violated and as such he is entitled to damages for the tort committed by *A*. At the same time, by assaulting *B*, *A* has committed a crime which is punishable by the State as assault is a menace to peace and well-being of society.

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(b) A steals B's car. He commits both a tort of conversion and the crime of theft. For the tort of conversion, he must restore the car to *B* or pay him compensation. For the crime of theft, he will be punished by the State.

When a wrong constitutes both a tort and a crime, the civil and criminal remedies *are not alternative* but *concurrent*. In such a case, the wrong-doer is liable to pay damages and undergo punishment also.

Tort and breach of contract. A tort is distinguished from a breach of contract in following respects :

1. *Consent of the parties.* In both tort and breach of contract, the wrong consists in a breach of duty. But whereas in tort the duties are primarily fixed by law, in a contract the duties are fixed by parties themselves. The agreement, the violation of which is known as breach of contract, is made by the parties with their free consent.

Example. If *A* trespasses over *B*'s land or damages *B*'s property or assaults *A*, it is a tort. *A* is under a duty imposed law (not specifically on A but on every member of the society) not to do any such thing. If, on the other hand, *A* agrees to sell his watch to *B* and then refuses to fulfil his obligation which he had voluntarily undertaken, i.e., to deliver the watch, there is a breach of contract.

2. *Duty in rem and duty in personam.* In a tort the duty is towards persons generally or community or world at large. Such a duty is called a duty *in rem*. A violation of this duty gives rise to an action in tort. In a contract the duty is towards a specific person or persons. Such duty is called a duty *in personam*, and is based on privity of contract. A violation of this duty gives rise to an action for breach of contract.

Examples. (a) A agrees to supply 100 bags of wheat to *B*. In this case *A* owes this duty only to *B*. This is a duty in *personam*. Likewise, *B* has a right to proceed against *A*, if there is a breach of contract. This is his right in *personam*.

(b) A purchased a bottle of ginger-beer from a retailer. The bottle contained a decomposed snail which was not visible at the time of purchase as the bottle was of dark opaque glass. The fact was discovered only when part of the contents of the bottle had been consumed. *Held*, *A* could recover damages from the manufacturer who owed a duty to take care that the bottle did not contain any noxious matter. The manufacturer owed this duty not only to *A*, but to everyone whom he intended to consume his products [*Donoghue* v. *Stevenson*, (1932) A.C. 562].

3. *Damages.* In a breach of contract, the damages may be liquidated *(i.e.*, when the amount payable is predetermined) or unliquidated (when the amount is not predetermined but is in the discretion of the Court). In a tort, the damages are always unliquidated.

4. *Motive.* Motive is not relevant in assessing damages in case of breach of contract. In a tort, it is. That is why in tort exemplary or vindictive damages are awarded by way of punishment to the wrongdoer. In a breach of contract exemplary damages are granted only in cases of breach of promise to marry or wrongful dishonour of a cheque by a bank.

5. *Minor's liability.* A minor's agreement is void. He cannot, therefore, enter into a contract and, therefore, the question of his liability for breach of contract does not arise. But a minor is liable in tort [*Burnard* v. *Haggis*, (1863) 14 C.B. (N.S.) 45].

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Sometimes the same act or injury may amount to both a tort and a breach of contract.

Examples. (a) Due to the negligence of the driver of a bus. *A*, a passenger, is injured. The transport company is liable to *A* not only for breach of contract of safe carriage of passengers but also for the tort of negligence.

(b) D, a dentist, extracts a wrong tooth of *A*. He is liable to *A* not only for breach of contract but also for the tort of negligence.

(c) A leaves a cow in custody of *B* to be taken care of. *B* allows the cow to die of starvation. *B* has not only committed a breach of contract by not taking due care of the cow, but also a tort of negligence.

In all the above cases, the plaintiff (*i.e. A)* can sue either for breach of contract or for the commission of a tort of negligence. He cannot claim the damages twice over.

Tort and quasi-contract. Under certain cirumstances, a person may receive a benefit to which the law regards another person as better entitled, or for which it considers he should pay to the other person. It such a case, the law requires him to make payment to the other person even though there is no contract between the parties. Such relationships are termed *quasi-contracts* or *constructive contracts* in the English Law and *"certain relations resembling those created by contracts"* under the Indian Law. A quasi- contract rests on the ground of equity that a person shall not be allowed to enrich himself unjustly at the expense of another.

A tort may be distinguished from a quasi-contract as follows :

1. *Measure of liability.* In case of a quasi-contract, the measure of the defendant's liability is equal to the advantage gained by the plaintiff, *i.e.*, to the extent to which he is unjustly enriched. In other words, the damages claimed are liquidated. In a tort, the plaintiff may recover only unliquidated damages.

2. *Duty in personam and duty in rem.* In a quasi-contract the duty is always towards a particular person *(i.e.. in personam)* whereas in a tort, the duty is towards persons generally *(i.e, in rem).*

Tort and breach of trust. In a breach of trust by the trustee, the damages which the beneficiary can claim are *liquidated* in nature. He already knows the damage caused to the property before he commences his action. In a tort, on the other hand, the damages are *unliquidated* and in the discretion of the Court.

Further, law of torts grew as a part of the Common Law of England whereas a breach of trust could be redressed in the Equity Court, *i.e.*, the Court of Chancery.

IS IT LAW OF TORT OR LAW OF TORTS ?

A controversy often arises as to whether it is a *law of tort* or a *law of torts.*

Pigeon-hole theory. According to Salmond, there is no law of tort but law of torts which consists of only a number of certain specific wrongs beyond which the liability under this branch of law could not arise. This means that unless the injury caused or damage suffered could be brought under an existing recognised head of liability, there was no remedy. Salmond observed in this regard as follows :

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"Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse."

This theory of Salmond is known as '*Pigeon-hole theory*'. It is so called because there is no principle of general liability as such and each tort is supposed to occupy one pigeon-hole, and if any particular wrong cannot be fitted into one of these pigeon-holes, the plaintiff has no remedy.

Obviously the pigeon-hole theory is unsound. According to this theory, no new torts can be recognised. There can be nothing more preposterous or illogical than this. If men will multiply injuries, action must be multipled too ; for every man who is injured ought to have recompense.

The untenable position of Salmond has, however, been retrieved by the subsequent editors of his book *Law of Torts*. For example, Heuston, the editor of the 17th edition of his book, observes that Salmond never committed himself to the proposition that the law of torts is a closed and inexpandable system. Defending Salmond, Professor Glanville Williams observes : "To say that the law can be collected into pigeon-holes does not mean that those pigeon-holes may not be copious, nor does it mean that they are incapable of being added to."

It appears that Salmond's critics have misunderstood him.

Winfield's view. According to Winfield, there is law of tort,[1] *i.e.*, there are general principles of tortious liability. According to this view, if I injure my neighbour he can sue me in tort whether the wrong happens to have a particular name like assault, battery, deceit, slander or whether it has no special title at all ; and I shall be liable if I cannot prove lawful justification.

Winfield's view appears to be logical, and as the law of tort is steadily expanding. "the idea of its being cribbed, cabined and confined in a set of pigeon-holes is untenable." Later on, however, Winfield modified his stand and in a note striking compromise between his and Salmond's theory observed that "from a narrow and practical point of view", the Salmond's theory will suffice, but "from a broader outlook" his own theory is valid.

Sir Frederick Pollock also holds the view that torts are infinitely various and over the last two centuries the number of torts has not only swelled considerably but the process is going on with the changing socio-economic conditions. Also refer to the observations made in the case of *M.C. Mehta v. Union of India*, A.I.R. (1987) S.C. 1086 (discussed later in this Chapter under the heading 'Strict liability').

ESSENTIAL ELEMENTS OF A TORT

A tort is a civil wrong (other than a breach of contract or a breach of trust) which is redressible by an action for unliquidated damages. Liability for a tort arises only when there is a breach of duty owed to the plaintiff (or, in other

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1 It is for this reason that Winfield's book on the subject is entitled *Law of Tort* whereas Salmond's book is entitled *Law of Torts*.

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words, when a right of the plaintiff is violated). In order to constitute a tort, it is essential that—

1. There must be some act or omission on the part of the defendant resulting in infringement of some right of the plaintiff.

2. The act or omission should result in a legal damage.

1. Act or omission

In order to succeed in an action for tort, the defendant must have done something which he is supposed not to have done, or must have omitted to do something which he was supposed to have done to the plaintiff. Thus if any act or omission of the defendant prejudicially affects any of the personal or proprietary interests or rights of the plaintiff which are protected by law, *e.g.*, his right of reputation, right to enjoy his property, right of personal freedom, right of bodily safety, and other miscellaneous rights like right to vote and right to accommodation at an inn, the plaintiff has a right of action against the defendant.

Examples. (a) A digs a pit on the road, *B* falls into it. *A* is liable to *B* in tort.

(b) A trepasses on B's land and causes some nuisance. *A* is liable to *B* in tort.

(c) A child who was 7 years old entered a botanical garden maintained by the Municipality. He ate berries of a poisonous shrub (which was not properly fenced) and died. *Held*, the Municipality was liable [*Glasgow Corpn.* v. *Taylor*, (1922) 1 A.C. 44].

(d) The clock tower in Chandni Chowk, Delhi, fell resulting in the death of a number of persons. The Municipal Corporation had failed to keep the clock tower in proper repair. *Held*, the Corporation was liable [*Municipal Corpn. of Delhi* v. *Subhagwati*, A.I.R. (1966) S.C. 1750].

The wrong ful act or omission must result in breach of a legal duty owed to the plaintiff, and it must be recognised by law. If it results in breach of a moral or social obligation, *e.g.*, failure to give food to a man starving on the road, or to save a drowning man, or to attend a brithday party of a friend's son, or if no legal duty is owed to the plaintiff, there is no liability in tort.

2. Legal damage

There can be no action for a tort unless there has been infringement of a legal right of the plaintiff, or in other words, a legal damage has been caused to the plaintiff. And if there has been infringement of a legal right, an action for a tort lies even when the plaintiff has not suffered any loss or damage. If, on the other hand, there is a damage, but no breach of duty by the defendant (or violation of the right of the plaintiff), the plaintiff has no remedy at law. These propositions are summed up in the following maxims :

(1) *Ubi jus ibi remedium.*

(2) *Damnum sine injuria.*

(3) *Injuria sine damnum.*

(1) *Ubi jus ibi remedium—Where there is a right, there is a remedy.* When a right of some person is violated or infringed, legal damage is said to be caused to him even though there may be no pecuniary loss. He has a right to get redress at law. The leading case on the point is:

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Ashby v. *White*, (1703) 2 Ld. Raym. 938. In this case, *A* was wrongfully prevented by the returning officer from exercising his vote at a parliamentary election. No loss was suffered by *A* because the candidate for whom he wanted to vote got elected. *Held*, *A* could recover damages on the ground that his legal right to vote was violated by the returning officer. Holt, C.J. observed in this case :

"If a man has a right he must of necessity have a means to vindicate and maintain it and a remedy if he is injured in the exercise or enjoyment of it and indeed it is a vain thing to imagine a right without a remedy ; want of right and want of remedy are reciprocal."

It would thus be seen that the *legal wrong* and *the legal remedy* are *correlative*. Where there is no legal remedy, there is no legal wrong.

(2) *Damnum sine injuria—Damage without a legal wrong. Damnum* means damage or loss in respect of money, comfort, health, etc. *Injuria* means infringement of a right conferred by law on a plaintiff. The maxim *damnum sine injuria* means that damage is suffered by the plaintiff without any violation of his legal right. For this there is no redress at law. In other words, it means that even if there is a damage, the plaintiff has no remedy at law. This is because there is no breach of duty by the defendant.

The mere fact that a man is injured by another man's act gives in itself no cause of action even if the act is deliberate. The injured party has no claim in law even though the injury is substantial, *so long as* the other party is exercising a legal right [*Grant.* v. *Australian Knitting Mills*, (1939) A.C. 65]. The leading cases on the point are :

Gloucester Grammar School. Re., 1410. Y.B. 11. Hen. 4 of 47. *A*, a school master, opened a school next door to his neighbour's school. Students from the neighour's school flocked to *A*'s school. *Held*, the neighbour had no cause of action as it was a case of *damnum sine injuria*. Hankford, J observed in this case :

"Thus if I have a mill, and my neighbour sets up another mill, and thereby the profits of my mill fall off, I cannot bring an action against him and yet I have suffered damage. But if a miller hinders the water from running to my mill or causes any other like nuisance I shall have such action as the law gives."

Chasemore v. *Richards*. (1854) 7 H.L.C. 349. A landowner dug an extensive well on his land for the purpose of taking out water for his own use. This deprived an adjoining owner of the use of the water resulting in a substantial loss to him. *Held*, the plantiff had no cause of action.

Mayor of Bradford Corpn. v. *Pickles*, (1895) A. C., 587. *P* wanted to sell his land at an exorbitant price to Bradford Corporation which it refused to buy. The Corporation's water used to flow underneath *P*s land which was on a higher level. To take a revenge, *P* sank a shaft on his land to reduce the Corporation's quantum of water and to spoil it qualitatively. *Held*, even though *P* had acted maliciously, no cause of action arose against him as he was exercising his lawful right.

(3) *Injuria sine damnum—Legal wrong without a damage.* While discussing *ubi jus ibi remedium*, it was observed that some times even though a legal right is infringed, no actual harm is caused to the plaintiff, *i.e.*, the person in whom the legal right is vested. But even in such a case the plaintiff has a right of action in tort. This principle is known as *injura sine damnum*, *i.e.*, legal wrong without actual damage [*Ashby* v. *White*, (1703) 2 Ld. Raym 938].

Salmond observed in this regard that torts are of two kinds, *viz.*,

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(a) Those which are actionable per se, i.e., without the proof of any damage. This happens when an 'absolute' private right of a person is violated. Thus the act of trespassing upon another's land is wrongful and actionable *per se* even though it may not have caused the slightest harm to the plaintiff. No man can set his foot upon my land without my licence ; if he does that, he is liable to an action though the damage be nothing. Likewise, libel is actionable *per se.*

(b) Those which are actionable only on proof of actual damage resulting from torts. Sometimes the law says : You will be held liable if in consequence of such an act, damage is inflicted on the plaintiff. In this case, there takes place violation of a 'qualified' right of the plaintiff. The plaintiff can take an action for tort only when he proves actual damage [*Ashby* v. *White*, (1703) 2 Ld. Raym. 938]. The leading cases on this point are :

Constantine v. *Imperial Hotels Ltd.*, (1944) K.B. 693. In this case the famous West Indian Cricketer, Constantine, was refused accommodation in one of the defendants' hotels where he wished to stay. He was, however, provided accommodation in someone of the defendants' other hotels. *Held*, Constantine was entitled to succeed in tort but he was awarded only nominal damages under the circumstances. His legal right was violated but no damage was caused to him.

Municipal Board of Agra v. *Ashrafi Lal*, (1921) 44 All. 202. A voter's name was wrongfully omitted from the voters' list. This prevented him from casting his vote. *Held*, he suffered a legal wrong for which an action in tort would lie.

Bhim Singh v. *State J. & K.*, A.I.R. (1986) S.C. 493. In this case, the petitioner, an M.L.A. of J. & K. Assembly, was wrongfully detained by the police while he was going to attend the Assembly session. He was also not produced before the Magistrate within the required period. The member was deprived of his right to attend the Assembly session. His fundamental right to personal liberty under Article 21 of the Constitution was also violated. The Supreme Court by way of consequential relief granted exemplary damages amounting to Rs. 50,000, although he had been released by then.

MENTAL ELEMENT IN TORT

As already observed, a tort is a civil wrong which is the result of a person's act or omission and which infringes the plaintiff's legal right. This act or omission is the physical element in a tort. In some torts, like deceit, assault, battery, false imprisonment, malicious prosecution and conspiracy, the state of mind of a person, *i.e.*, mental element, is also relevant to ascertain his liability.

Examples. (a) There were certain electric wires beneath *X's* land of which he was not aware. When he was excavating land the wires got damaged. *Held*, *X* was not liable [*National Coal Board* v. *J.E. Evans & Co.*, (1951) 2 All E.R. 310].

(b) A fire breaks out on *A's* land. To prevent the spread of fire, his servants trespass into *B's* land. *A* is not liable under the circumstances as what is done is reasonably necessary.

In some torts, known as torts of strict liability (discussed later in this Chapter), liability attaches irrespective of the mental element. In such cases the wrong-doer is liable even when he is not at fault. Even an honest mistake on his part is no defence. For example, when there is a tort of conversion, the wrong-doer is liable even though he is acting innocently.

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The question of mental state of the wrong-doer in a tort revolves round two basic points, *viz.*, whether he committed the tort (1) intentionally, or (2) negligently.

(1) *Intention.* Intention means a desire or determination on the part of a person to bring about a certain result. The only way to know his intention is to assess it from his manifest conduct, *i.e.*, what he does or what he brings about by his action or conduct. The centuries old *cliche* "that the thought of man shall not be tried, for the Devil himself knoweth not the thought of a man" is absolutely relevant in this regard. If there is an infringement of the legal right of a person, there is a legal wrong for which there is remedy in tort. It makes no difference whether the interntion was good or bad because the liability in tort arises from a wrongful act and not from the intention of the wrong-doer.

(2) *Negligence.* Negligence means failure to exercise the care that a prudent person usually exercises. It is the result of his inadvertence, not caring about the consequences. For example, if the owner of a dog which has gone mad or ferocious leaves it on the road, and it bites a person, there is negligence on the part of the owner and he is liable in tort.

MOTIVE

Motive is generally not relevant in determining the liability for tort. It is not the same thing as intention.

Example. A finds *B* starving on the roadside. He makes up his mind to steal food and feed *B*. His *intention* is to commit theft and his *motive* is to feed *B*.

The law does not take into account motive as constituting an element of civil wrong. There are two fundamental rules in this regard :

1. *A wrongful act does not become lawful merely because the motive is good.* Thus if *A* commits a theft to pay off the fees of a poor school boy, the act amounts to an offence oven if his motive is good. The leading case on the point is :

South Wales Miners' Federation v. *Glamorgan Coal Co.*, (1905) A.C. 239. A miners' union ordered its members (workmen employed in some mines) to abstain from work on certain days in violation of their agreement. This act was done not with any malice or ill-will towards the plaintiffs, the owners of the mines, but with the object of keeping up the price of the coal by which the wages of the workmen were regulated. *Held*, the miners' union was liable.

2. *A lawful act does not become wrongful because of a bad motive.* Thus if a trader reduces the price of his goods much below his cost to wipe out his competitors, his act is not wrongul in the eyes of the law, although obviously his motive is bad.

Town Area Committee v. *Parbhu Dayal*, A.I.R. (1975) All. 132. *P* constructed 16 shops without complying with the provisions of the U.P. Municipalities Act. The Town Area Committee demolished these shops. *P* alleged malice on the part of the Town Area Committee. *Held*, the demolition of an illegal construction was perfectly lawful.

Malice. The term 'malice' is used in two senses :

(1) In its legal technical sense, malice means a wrongful act done intentionally without just cause or excuse. [*S.R. Venkataraman* v. *Union of India*, A.I.R. (1979) S.C. 49].

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(2) In its narrow and popular sense, malice means an ill-will, spite or malevolence. It is generally not relevant in determining a person's liability in the law of torts. However, it becomes relevant in the following cases :

(a) Malicious prosecution ;

(b) Injurious falsehold ;

(c) Defamation on a privileged occasion ;

(d) Conspiracy ;

(e) Wilful and malicious damage to property ;

(f) Slander of title.

CAPACITY TO SUE OR BE SUED

'Capacity' is a compendious term used in the context of law of torts to signify 'capacity to sue' or 'liability to be sued'. The general rule in regard to capacity is that every person who suffers an injury by the wrongful act of another in breach of his legal duty has the capacity to sue that other in tort ; likewise, every person who does the wrong is liable in tort. Of course, there are certain exceptions to this rule in case of certain persons. These exceptions are discussed below :

Alien enemy. An alien is a person who is not a subject of India. He is an alien enemy if his country is at war with India. An alien enemy can neither sue nor be sued for a tort in an Indian Court. But if he is residing in India with the permission of the Central Government, he may sue or be sued.

Minor. *(a) Capacity to sue.* A minor may sue, like an adult, for any wrong done to him. The only difference in the position of a minor is that he can sue through his next friend who must be a major. So far as pre-natal (prior to birth) injuries are concerned, a reference may be made to the following Irish and Canadian cases :

> *Walker* v. *G.N. Rail. Co. of Ireland,* (1891) L.R. Ir. 69 (Irish Case). In this case, a pregnant woman was injured in a railway accident caused by the negligence of the railway. As a consequence, a deformed child was born to her. *Held,* the minor child could not recover for the injuries as (1) the railway company was not aware of the existence of the child in uterus, and (2) it owed no duty of care towards it.

> *Montreal Tramways Co.* v. *Leveille,* (1933) SCR (Canada) 356 (Candian Case). In this case with parallel facts, it was held that a minor could recover damages for pre-natal injuries.

(b) Liability to be sued. Under law of torts, a minor is liable in damages like a person of full age, and minority is no defence to an action in tort. Even a child of 7 years could be sued in one case for trespass [*O' Brien* v. *Mcnamee,* (1953) I.R. 86]. The liability of a minor under law of torts that way is stricter than his liability even under the Indian Penal Code, 1860. However, while fixing the liability of the minor for certain torts, the Courts do take into account the mental development of the minor. In *Walmley* v. *Hamenick,* (1954) 2 D.L.R. 232, the Supreme Court of British Columbia held that the defendant, a child of 5 years, could not be liable for negligence because he "had not reached that stage of mental development where it could be said that he should be found legally responsible for his negligent acts."

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Liability for tort and contract. A minor is liable in tort but for breach of contract as an agreement entered into with or by a minor is void [*Mohori Bibi* v. *Dharmodas Ghose*, (1903) 30 Cal. 539]. If the act of a minor results both in tort and a breach of contract, the minor cannot be sued in tort. If an action in tort were allowed in such a case, it would be an indirect way of enforcing the contract. The following leading cases explain the point :

Johnson v. *Pye*, (1665) 1 Sid. 258 : 1 Keble 913. A minor obtained a loan of £300 by falsely representing his age. *Held*, he was not liable to repay the loan in an action for deceit.

Jennings v. *Rundall*, (1799) 8 Term. 335. A minor hired a mare for a ride. The mare was injured while the minor was riding it. *Held*, he was not liable as the injury was not due to a tortious act but essentially due to breach of contract for which a minor is not liable.

If, however, a minor's wrong, even though concerned with the subject-matter of a contract, is independent of the contract, he is liable. The rule is illustrated by the following cases :

Burnard v. *Haggis*, (1863) 14 C. B. (N.S) 45. *B*, a minor, hired a mare from *H* on the express condition that it was no to be used for "jumping." He lent it to a friend who used it for jumping over a high fence as a result of which the mare fell and was killed. *Held*, the minor was liable in tort for negligence which was independent of contract.

Ballet v. *Mingay*, (1943) K.B. 281. A minor hired a microphone and an amplifier. He was unable to return them as he had, contrary to the terms of bailment, passed them on to a friend. *Held*, he was liable for detinue. The Court of Appeal observed in this case : "The circumstances in which the goods passed from his possession and ultimately disappeared were outside the purview of the contract of bailment altogether."

Liability of parents for minor's torts. As a general rule, a parent or a guardian is not liable for the torts of his childern or wards even though they are under age and living in his house. There are two exceptions to this rule :

1. When the child is acting as his father's *agent* or servant, the father is vicariously liable (in the capacity of an employer). For example, if a father sends his minor son in his car on some business and the son by negligent driving knocks someone down, the father would be liable, as master, in an action for tort.

2. Where the father, by his own *personal negligence*, affords or allows his son an opportunity of doing mischief, he is liable. Note the following case in this regard :

Bebee v. Sales, (1916) 32 I.L.R. 413. A father got an air gun to his son aged 15. The boy smashed a neighbour's window with it. The father received a complaint to this effect but did not take back the gun from the son who after some time accidentally injured the eye of another boy. *Held*, the father was liable.

Lunatics and drunkards. A lunatic is a person who suffers from intervals of sanity and insanity. Insanity is not a defence to tortious liability. He is liable *unless* he is mentally incapable of forming some specific intention or having malice which is an essential ingredient of a particular tort. The non-

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existence of such specific intention or malice may be proved by insanity. But there are certain wrongs which are actionable, independently of any question of intention or malice. For example, in cases of trespass, defamation or conversion, insanity of the wrong-doer is no defence.

The above rules also apply to persons who commit a wrong in a state of delirium due to high fever or in an epileptic fit.

A drunkard, like a lunatic, is also not exempt from tortious liablity.

Insolvents. (1) *Capacity to sue.* A tort may be committed against the *(a)* person, or *(b)* property, of an insolvent.

(a) Tort against person of insolvent. If a tort is committed against the person, reputation or feelings of an insolvent *(e.g.,* assault, defamation, battery, etc.), he has a right of action against the wrong-doer and the compensation recovered may be retained by him to the extent it is required for the maintenance of the insolvent or his dependants.

(b) Tort against property of insolvent. If a tort is committed against the property of an insolvent, the right of action passes to the Official Receiver or Assignee for the benefit of his creditors.

(2) *Liability to be sued.* An insolvent is liable in a tort committed by him, either before or during insolvency. When a decree is issued against him, the decreed amount is a debt provable in insolvency.

Husband and wife. (1) *Action between husband and wife.* Under the Common Law, a husband and his wife were treated as one person and, therefore, neither the husband nor the wife could sue each other in tort. The Married Women's Property Act, 1882, however, recognised the separate property of women and permitted her to sue her husband in tort for the protection and security of her property. The Law Reform (Husband and Wife) Act, 1962 has abolished the rule prohibiting actions between a husband and his wife. Both the husband and wife can now sue each other as if they were not married.

(2) *Husband's liability for wife's torts.* Under the Common Law, if a married woman committed a tort, the third party could sue both husband and wife together. Likewise, a wife could sue a third party in tort together with her husband. The Law Reform (Married Women and Tort-Feasors) Act, 1935 has abolished this rule. A married woman can now sue and be sued as if she were *femme sole* (an unmarried woman).

In India, the Married Women's Property Act, 1874 applicable to Christians, recognises the separate property of married women so that she may sue and be sued as if she were *femme sole.* But as regards personal wrongs like defamation and assault, neither the husband nor the wife can sue each other. The Hindus and Mohammedans are governed by their personal laws in this regard. A Hindu married woman can sue and be sued in respect of her separate property. Thus a husband in India is not liable for his wife's torts.

Corporation. A corporation, though a legal entity in the eyes of the law, is an artificial person, existing only in contemplation of law. It is distinct in law from its members. It has neither a mind nor a body of its own. As such, it cannot act in its own person, but must act through its agents and servants. The liability of a corporation is, therefore, always a vicarious liability.

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(1) *Capacity to sue.* A corporation can sue for the torts committed against it, *i.e.*, its property and its business, but a tort like assault or personal defamation cannot be committed against it and as such it cannot sue for these torts. It may also sue for malicious presentation of a winding up petition or for defamation if it affects its business reputation.

(2) *Liability to be sued. (a) Intra vires torts.* A corporation is liable for a tort committed by its agents like an individual employer, provided the act is within the course of their employment. The following case explains the point :

> *Citizen's Life Assurance Co.* v. *Brown*, (1904) A.C. 423. *The* superintendent of a company sent a circular to the policy-holders against an ex-employee of the company. *Held*, the company was liable for the tort of defamation as it was committed by the superintendent during the course of his employment.

At one time it was thought that for torts like malicious prosecution or fraudulent misrepresentation or deceit, a corporation could be sued only if the mental element (wrongful intention) was present, but it is now settled that a corporation may be sued even for malicious prosecution and fraudulent misrepresentation on the ground that the agents acting on behalf of the corporation are capable of having the malice or indulging in fraudulent practices.

(b) Ultra vires torts. A corporation is liable for a tort if it can be shown that the activity in the course of which tort was committed falls within the scope of the Memorandum and the agent or servant committed the tort within the course of his employment. The following case supports this point :

> *Poulton* v. *London & S.W. Rail, Co.*, (1867) L.R. 2 Q. B. 534. A railway company had the statutory authority to arrest passengers for non-payment of passenger fare but not for any other reason. The Station Master arrested the plaintiff, a passenger, for the non-payment of the fare of his horse. *Held*, the railway company was not liable for the act of the Station Master as it was *ultra vires* the railway company.

Salmond has laid down the true principle as follows :

> "Every act done, authorised or ratified on behalf of the corporation by the supreme governing authority of that corporation, or by any person or body of persons to whom the general powers of the corporation are delegated is for the purpose of the law of torts the act of the corporation itself, whether *intra vires* or *ultra vires* of the corporation and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment."

Persons having parental or quasi-parental authority. According to Children and Young Persons Act, 1933, a parent, teacher or other person having lawful control or charge of a child or young person is allowed to administer punishment on him. When a child is sent to a school, the disciplinary authority is supposed to have been delegated to the teacher by the parent or guardian. The teacher can punish the child for a wrong committed whether inside or outside the school, and this does not amount to assault provided—

(a) the punishment is moderate only ;

(b) the teacher is not actuated by malice ; and

(c) the punishment is not against the regulations of the school.

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Persons having judicial and executive authority. The Judicial Officers' Protection Act, 1850 provides that "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction:

Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of..."

But no such protection is granted if a magistrate while acting *mala fide*, illegally and outside his jurisdiction, orders the arrest of a plaintiff. If he orders the arrest in such a case, he is liable for the wrong of false imprisonment [*Sailajanand Pande* v. *Suresh Chandra Gupta*, A. I. R. (1969) Pat. 194].

Executive Officers are also not liable for acts done by them in the exercise of their duties in good faith.

State. An act of State, in the context in which the term is used here, means an act done in exercise of the sovereign power of the State in relation to another State or subjects of another State. The essentials of such an act are that—

1. It is done by some representative of the State.
2. It is injurious to some other State or its subjects.
3. It may have been previously sanctioned or may be subsequently ratified by the State [*Buron* v. *Denman*, (1848) 2 Ex. 167].

Foreign sovereigns, ambassadors and accredited representatives. A foreign sovereign is not liable to be sued in any Indian Court for any tort committed by him unless he voluntarily submits himself to the jurisdiction of an Indian Court. In order to sue a foreign sovereign or ruler, consent of the Central Government is required (Sec. 86 of the Civil Procedure Code, 1908). A foreign sovereign may, however, sue in an Indian Court to enforce a private right provided his State has been recognised by the Union Government.

GENERAL DEFENCES TO TORT

A civil wrong committed against a plaintiff gives the plaintiff the right of action against the defendant in tort. The defendant may, however, avoid his liability by taking the plea of some defence.

The general defences which may be raised by a defendant are :

1. *Volenti non fit injuria*, *i.e.*, where there is consent, there is no injury ;
2. Act of God ;
3. Plaintiff himself a wrong-doer ;
4. Inevitabale accident ;
5. Private defence ;
6. Mistake ;
7. Necessity ;
8. Statutory authority.

1. Volenti non fit injuria

This means where there is consent there is no injury, *i.e.* when a person has voluntarily agreed or consented to take the risk of injury, he has no

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remedy in tort. It should, however, be noted that consent is not given to cause injury but only to run the risk of a possible injury. No man can enforce a right that he has voluntarily waived or abandoned.

Consent to suffer the injury may be express or implied.

Examples of express consent. (a) A invites *B* to a dinner at his house. He cannot sue *B* for a trespass.

(b) A asks *B*, a surgeon, to perform a lawful surgical operation on him. He cannot sue *B* for an injury received in the course of operation provided it is not due to the negligence of *B*.

Examples of implied consent. (a) A takes part in a wrestling or cricket match. He has given an implied consent that if he is injured, he will have no cause of action.

(b) A spectator in a horse race or at a circus or an automobile race impliedly consents to take upon himself an injury which may come to him in normal circumstances. Salmond observed in this regard :

"So spectators at cricket, football, hockey and polo matches, at motor races, and flying meetings take upon themselves the risk of such perils as may reasonably be expected to occur at such meetings as well as the risk of improbable accidents. So again he who goes upon a golf course, whether as player, caddie or spectator, takes upon himself the risk of harm from the dangers naturally incidental to presence on a golf course, but not the risk of injury by the negligent act of other persons playing there."

Thus a person cannot sue another in respect of a danger not unlawful *per se* that was visible, apparent and lawfully encountered.

Hall v. *Brookland Auto Racing Club*, (1933) 1 K.B. 205. *H* was a spectator at a motor car race in which two cars collided and injured *H*. *Held*, *H* impliedly took the risk of such injury and was, therefore, not entitled to recover damages in tort.

Padmavati v. *Dugganaika*, (1975) 1 Kam. L.J. 93. Two strangers took lift in a jeep. The jeep broke down as a result of which the strangers were thrown out, sustained injuries and one of them died. *Held*, the driver or his master was not liable as the strangers had voluntarily got the lift.

Wooldrige v. *Sumner*, (1963) 2 Q. B. 43. The plaintiff, a photographer, was taking photographs at a horse show. As one of the horses, belonging to the defendants, took the bend very fastly and galloped furiously, the plaintiff got frightened and fell into the horses' course and got seriously injured. *Held*, the defendents were not liable as they had taken due case. The plaintiff had voluntarily taken the risk of injury known in the game.

Volenti non fit injuria and not scienti non fit injuria. The maxim does not apply when there is *scienti* (knowledge) of the danger. Knowledge does not necessarily imply consent. Nor does it follow that a person necessarily undertakes a risk merely because he knows of it.

Smith v. *Charles Baker & Sons*, (1891) A. C. 325. Smith was employed by Baker & Sons for the purpose of cutting a stone rock. By means of a crane, stones used to be conveyed from one end of the quarry to the other over Smith's head. Both Smith and Baker & Sons knew that there was a risk of the stones falling. A stone fell from the crane and injured Smith. *Held*, he could recover damages because

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his consent to the assumption of danger could not be presumed from knowledge of the danger.

Bowater v. *Rowley Regis Corpn.*, (1944) K.B. 476. Bowater, a cart driver, was ordered by the defendant corporation, his employer, to use a horse which to the knowledge of both of them had bolted on at least two earlier occasions. He used the horse under protest, and was thrown off the cart and injured. *Held*, he could recover damages and the plea of *volenti non fit injuria* would not apply.

Thus for the maxim *volenti non fit injuria* to apply two conditions must be satisfied :

(1) The plaintiff must have known of the risk ; and

(2) He must have consented to take the risk freely upon himself, *i.e.*, agreed to suffer the harm, having full knowledge of the risk involved.

Exceptions to the maxim. The defence of *volenti non fit injuria* does not apply to —

(1) *Rescue cases.* When a person voluntarily undertakes a risk, out of a sense of moral duty, to rescue somebody from an imminent danger, and sustains an injury, he can recover damages in tort from the person through whose wrongful conduct the situation arose.

Haynes v. *Harwood & Son*, (1935) 119 K.B. 146. The defendants' servant left a two-horse van unattended in a street. An urchin threw a stone on the horses which were upset and ran with the van. A police constable on duty stopped the horses fearing that otherwise they might trample women and children. In doing so he sustained injuries. *Held*, he was entitled to recover damages.

The rule laid down in *Haynes* v. *Harwood & Son* also applies in cases of rescue of property. Note the following case :

Hyett v. *Great Western Rail. Co.*, (1947) 2 All E.R. 264. A fire occurred due to the negligence of the defendant. The plaintiff was injured in an attempt to save defendant's property from fire which constituted a danger to property but not to life or limb. *Held*, he was entitled to claim damages for injuries caused to him as his conduct was considered to be reasonable.

(2) Cases of negligence.

(3) Cases of unlawful acts, *e.g.*, fighting with sharp swords or boxing with naked fists.

(4) Cases of liability under the Workmen's Compensation Act, 1923.

2. Act of God

An act of God is an event or accident resulting from operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it. In Halsbury's Laws of England, an act of God has been explained in the following words :

"An act of God in the legal sense may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against, or more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pain and care reasonably to be expected of the person sought to be made liable for it or who seeks to be excused himself on the ground of it. The occurrence need not be unique, nor need it be one that happens

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for the first time ; it is enough that it is extraordinary, and such as could not reasonably be anticipated and it must not arise from the act of man."

To be successful in the defence of act of God in an action for tort, two essentials are necessary :

(1) *There must be working of natural forces.* Accidents may happen by reason of the play of natural forces or by intervention of human agency or by both. It may be that in either of these cases accidents may be inevitable. But it is only those acts which can be traced to natural forces and which have nothing to do with the intervention of human agency that could be said to be acts of God. Note the following case :

Nichols v. *Marsland*, (1876) 2 Ex D.I. The defendant constructed a dam on a natural stream by means of an embankment and thus created some artificial lakes on his land. An extraordinarily heavy rainfall (heaviest in the memory of witness) broke down the embankment as a result of which four bridges of the plaintiff lower down were washed away. *Held*, the defendant was not liable as the loss was the result of an act of God.

Ramalinga Nadar v. *Narayana Reddiar*, A.I.R. (1971) Ker. 197. The criminal activities of an unruly mob which robbed the goods transported in the defendant's lorry cannot be considered as an act of god as it is not the working of natural forces. There is intervention of human agency.

(2) *The occurrence must be extraordinary.* The act should not be one which could be anticipated and reasonably guarded against. For example, death caused by the collapse of a wall of a building due to ordinary or normal rainfall could not be defended on the plea of an act of God.

3. Plaintiff himself a wrong-doer

Under the law of contract no action is allowed on an illegal or immoral agreement. The rule of law in this regard is : *exturpi causa non oritur actio* which means no action arises from a base cause. This means the plaintiff will not succeed if he bases his cause of action on an illegal or immoral agreement.

The position under law of tort is different. The mere fact that the plaintiff was a wrong-doer does not disentitle him from recovering damages from the defendant for latter's wrongful act. Thus if *P* trespasses into *D's* house, *D* cannot inflict unnecessary injuries upon *P*. If any such injury is caused by *D*, the trespasser *(P)* is liable to an action for the injury which he does, but he does not forefeit his right of an action for injury sustained.

Bird v. *Holbrook*, (1928) 4 Bing. 628. *A* put a spring gun in his garden for the protection of his fowl, without putting up any notice about the same. A boy in search of a fowl strayed into the garden and came into contact with the gun and was injured. *Held*, *A* was liable as the force used was excessive.

The position may now be summed up as under :

1. The plaintiff has no cause of action where his own wrongful act is the determining cause of the harm suffered by him.

2. The plaintiff has a cause of action where the wrongful act of the defendant and not of the plaintiff is the determining cause of the harm suffered by the plaintiff. He may also claim compensation if his wrongful act is quite independent of the harm caused to him.

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4. Inevitable accident

An accident is an act or event which occurs by chance and which is unintentional in regard to its consequences. It is inevitable if it cannot be avoided in spite of reasonable care required of a reasonable person in the given situation. In the words of Pollock, inevitable accident is one which is "not avoidable by any such precautions as a reasonable man doing such an act then and there, could be expected to take."

Stanley v. *Powell*, (1891) 1 Q.B. 86. One of the members of a pheasant shooting party, who was engaged in carrying cartridges and game for the party, was accidentally hit and injured by a pellet fired by another member of the party at a pheasant. *Held*, the injury was accidental.

Holmes v. *Mather*, (1875) L.R.. 10 Ex. 261. *A's* servant was driving his horse on a public highway. The horse became unruly due to the barking of a dog, and in spite of the best effort by the servant it could not be controlled and it knocked down the plaintiff. *Held*, *A* was not liable.

Slattery v. *Hailey*. (1923) 3 D.L.R. 156 (O.N.T). *A* while driving his automobile became suddenly unconscious and fell back in his seat. An accident was thereby caused resulting in the death of the plaintiff's son. *Held*, the plaintiff could not recover compensation as no liability could be imposed in a case of non-negligent and unconscious defendant.

Brown v. *Kendall*, (1850) 6 Cush. 292. In a fight between the dogs of the plaintiff and the defendant, the defendant while trying to separate the dogs, accidentally hit the plaintiff, who was standing nearby, in his eye. *Held*, the defendant was not liable as the injury to the plaintiff was the result of pure accident.

It should also be noted that any accidental damage to the property of the defendant is not actionable.

National Coal Board v. *J.E. Evans*. (1951) All E.R. 310. *E's* (plaintiff's) predecessors in title had laid an electric cable under the land of a county council without the knowledge of the county council. The contractors employed by the county council to make some excavations damaged the cabale in course of excavation as they were not aware of the underground cable. *Held*, the defendants were not liable as they had no opportunity of discovering the cables which were wrongfully put by *E's* predecessors on another's land.

5. Private defence

If a persor uses reasonable amount of force in defence of his person or property, no liability for the harm caused by the tort arises. The force used must not, however, transgress the reasonable limits and should in no case be excessive. It must also be proportionate to the danger apprehended. If, for example, *A* strikes *B*, *B* cannot justify drawing his sword and cutting off *A's* hand ; but if it is an assault whereby in probability life may be in danger, use of force may be justified [*Cook* v. *Beal*, (1697) 1 Ld. Raym. 175). Sec. 96 of the Indian Penal Code, 1860 also provides that nothing is an offence which is done in the exercise of the right of private defence.

But to avail of the right of private defence, it is necessary that :

(1) there was *imminent threat* to the personal safety or property. You cannot, for example, assault a person on the apprehension that he will attack you some day ;

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(2) the force used was *absolutely necessary* to repel the assault and was *also reasonable* ;

(3) the force was used in *defence* of one's person or property.

Cresswell v. *Sirl*, (1948) 1 K.B. 141. *A* shot *B*'s dog which trespassed into his *(A's)* piggery and was chasing and attacking his pigs. *Held*, he was justified in shooting *B*'s dog.

Scott v. *Shepherd*, (1773) 2 W.B.L. 892. A threw a lighted squib (fire cracker) into a crowded market place. It fell on *B's* ginger-bread stall. To prevent injury to himself and to his goods he picked it up and threw away the squib. It hit and put out *C*'s eye. *Held*, *B* was not liable as he was acting in private defence. *C* could, however, recover damages from *A*.

6. Mistake

Mistake, whether of fact or of law, is generally no defence to a tortious liability. When a person wilfully interferes with the property, personal liberty or some other right of another person, he commits a wrong. He cannot be permitted to say that he did the act in the honest belief that what he was doing was justified when, in fact, no such justification existed. If *A* enters *B*'s land thinking that it is his own land, there is a trespass and *A* cannot take defence of mistake in an action for tort. Likewise, an auctioneer who sells goods on behalf of a customer having no title to them is liable for tort of conversion to the true owner, even though he honestly believed that the goods belonged to the customer.

Exceptions. To the general rule of absolute liability for mistake, there are some exceptions. The defendant may avoid liability, for example, when—

1. there is mistaken prosecution of an innocent man ;

2. there is mistaken belief in an action for deceit ;

3. there is mistake of a servant which puts his act outside the course of his employment ;

4. the mistake is induced by the plaintiff himself, *e.g.*, where as a practical joke, he leads a policeman to arrest him for a crime which he has not committed.

7. Necessity

Sometimes a person may, in some emergent circumstances, deliberately do an act which results in some harm or causes some damage or loss but he does it to prevent a greater evil or loss. In such a case he is not liable for an action in tort provided there was a real necessity to do the act which results in damage. For example, in cases like throwing of goods overboard a ship to lighten it for saving the ship or persons on board the ship, or pulling down a house to prevent a fire from spreading, or pulling out a drowning man from water, or forcible feeding of a hunger striker to save his life, there is a necessity. Note the following cases also :

Cope v. *Sharpe*, (1891) 1 K.B. 496. A fire broke out on *A*'s land. A gamekeeper of *B* who had shooting rights over some of *A*'s land entered *A's* land to prevent the spread of fire to his land. *Held*, the gamekeeper was not liable for trespass as his act was reasonably necessary to save the game from real and imminent danger.

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Carter v. *Thomas*, (1891) R. B. 673. The defendant who entered the plaintiff's premises in good faith to extinguish fire at which firemen had already been working, was held to be liable for trespass as his interference was not reasonably necessary.

8. Statutory authority

Where an act is done under a statutory authority, the damage resulting from such act (which would otherwise have been wrongful and actionable) is not actionable in tort as statutory authority affords a valid defence. Not only this, that which is necessarily incidental to the exercise of the statutory authority is also held to have been authorised by implication. Thus if a railway line is constructed there may be interference with private land, and when the trains are run, noise, vibration, smoke and emission of sparks are the incidental consequence for which no action in tort will lie. The following is a case in point :

Vaughan v. *Taff Vale Rail. Co.*, (1860) 5 H. & N. 679. A railway engine emitted sparks. In spite of the proper care taken, a fire was caused to the woods on the land adjoining the railway line. *Held*, the railway company was not liable as it had taken proper care to prevent the emission of sparks.

In *Geddis* v. *Proprietors of Bonn Reservoir*, (1878) 3 A.C. 430, Blackburn J. observed : "It is now thoroughly well-established that no action will lie for doing that which the Legislature has authorised, if it be done without negligence, although it does occasion damage to any one : but an action does lie for doing that which the Legislature has authorised, if it be done negligently." The following cases explain the point :

Smith v. *London & South Western Rail. Co.*, (1870) L.R. 6 C.P. 14. In a very dry summer, the servants of a railway company cut the grass and trimmed the hedges near the railway line. They negligently left the trimmings in heaps near the railway line. Sparks from an engines set a heap on fire. A high wind carried the fire across a road and completely destroyed the plaintiff's cottage. *Held, the* railway company was liable as it was guilty of negligence.

Whalley v. *Lancashire & Yorkshire Rail.*, (1884) 13 Q.B 131. On account of an unprecedented storm and rainfall, water accumulated against a railway embankment. To save the embankment the railway authorities pierced holes in it. As a result the plaintiff's lands were flooded and he suffered loss. *Held, the* railway was liable as they had no right to protect their property by shifting the loss on to the plaintiff.

STRICT LIABILITY

The Rule in Rylands v. Fletcher

In some cases, a person (defendant) is liable for the harm caused to another (plaintiff) even though there is no negligence on his part and he never intended such a harm to come to the other person. In such cases even the defence of invevitable accident is also not a valid defence. The liability attaches even without any fault on the part of the defendant. This is known as *principle of strict liability* or *liability without fault*. This principle was laid down in the case of *Rylands* v. *Fletcher*, (1866) L.R. 3 H.L. 330. The facts of the case were as follows :

Rylands v. *Fletcher*. A, the owner of a mill, employed an engineer and a contractor to construct a reservoir over his land to provide water to his mill. While

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digging and constructing the reservoir, the contractor failed to notice some disused shafts under the site of the reservoir and as such did not block them up. Shortly after the water was filled in the reservoir, it broke through some of the shafts and flooded *B*'s (the plaintiff's) coal mines on the adjoining land. *Held*, *A* was liable in respect of the damage caused to *B* even though the damage was caused not due to the negligence of *A* but due to the negligence of the independent contractor. Blackburn J. observed in this case :

"We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape."

The rule as laid down in *Rylands* v. *Fletcher* is known as the rule of *strict liability*. This makes the defendant liable for the acts of an independent contractor and also for an inevitabale accident. The rule is applicable when harm is caused by the escape of fumes, gas, electricity, wild animals, etc.

Note the following Indian cases also :

M.C. *Mehta* v. *Union of India*, A.I.R. (1987) S.C. 1086. On 4th December, 1985 a major leakage of Oleum gas took place from one of the units of Shriram Foods & Fertilizers Industries and this leakage affected a large number of persons, both amongst the workmen and the public and one person died on account of inhalation of Oleum gas. *Held*, the enterprise was liable.

The Supreme Court considered in the above case the question as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry ; if by reason of an accident occurring in such industry, persons die or are injured. The Court observed : "The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part.

The Supreme Court in the above case took a bold decision and held that it was not bound to follow the 19th century rule of English law, and it could evolve a rule suitable to the social and economic conditions prevailing in India at the present day. It evolved the rule of '*absolute liability*' as part of Indian Law in preference to the rule of strict liability. It expressly declared that the new rule was not subject to any of the exceptions under the rule in *Rylands* v. *Fletcher*. The reasons which the Court gave for not allowing the exceptions to govern were that *firstly*, the enterprise carrying on such hazardous and inherently dangerous activity for private profit has a social obligation to compensate those suffering therefrom, and it should absorb such loss as an item of overheads. Secondly, the enterprise alone has the resources to discover and guard against such hazards and dangers.

Further the Court also held that the measure of compensation payable should be correlated to the magnitude and capacity of the enterprise, so that the same can have deterrent effect.

Mukesh Textile Mills (Pvt). v. *H.R. Subramanya Sastry*, A.I.R. (1987) Kant. 87. The paddy and sugarcane crops of the plaintiff in this case were damaged due to

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inundation of water overflowing from the mud tank wherein the defendant had stored large quantities of molasses, a by-product from the manufacture of sugar. The inundation took place because of the breach of earthen embankment of the tank due to holes made in the wall by rodents. *Held*, the defendant was liable for the damage caused to the neighbour as "by storing large quantities of a liquid close to the plaintiff's boundary, the defendant chose to assume a relationship with an outsider and the law required of him to conduct himself as a reasonable man with adequate skill, knowledge and resources would have conducted himself."

In an unprecedented tragedy that took place at Bhopal on account of deadly leak from the Union Carbide Corporation's hazardous activities of storing deadly material and in which more than, 4,000 persons lost their lives and more than 5 lakh persons were badly injured, the Bhopal District and Sessions Judge, Mr. M.V. Deo, ordered the Union Carbide Corporation on 17th December, 1987 to deposit in his Court Rs. 350 crores for payment of "substantial interim compensation and welfare measures" to the gas victims. The judge observed :

"Will it be not prudent to order payment of a relative sum bearing in mind all progress in the case so far, the facts and figures (though not disputed) which have come on record and the material furnished during the settlement efforts made by Judge Keenan ?"

The Judge asked and added, "after all, interim relief is never and can never be exact like the final adjudication in its very nature. We have to bear in mind all the aforesaid facts and circumstances and name a sum which would not be unjust to either side as interim relief."

Dealing with the question of precedence, the judge quoted the dictum of Lord Denning saying : "If we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both." So the law would not stand still. It would act in the aid of justice to the distressed gas victims to move ahead towards amelioration. Law activates the Court and the Court orders, the judge said.

On February 14-15, 1989 the Supreme Court ordered settlement between the Union Carbide Corporation and the Government of India of 470 million dollars (Rs. 715 crores) as compensation to Bhopal gas victims. In a review petition before the Supreme Court on the ground that it has no right to stifle prosecution, grant immunity against all future prosecution and give an acquital of Union Carbide which had been charged with non-compoundable offence of murder, a 5-judge Constitution Bench of the Supreme Court on 29th August, 1990 reserved its judgment on a bunch of petitions seeking review of its February last year order approving a dollar 470 million settlement between the Union Carbide Corporation and the Indian Government towards full and final settlement of the claims by the victims of the Bhopal gas disaster.

Exceptions to the Rule

The rule in *Rayner* v. *Fletcher* does not apply if —

(1) the mischievous thing is collected under statutory authority ;

(2) the land is put to natural use ;

(3) the escape of the thing is caused by—

(a) an act of God ;

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(b) the wrongful act of a third party ;

(c) plaintiff's own fault ; or

(d) the consent of the plaintiff.

These exceptions are considered below :

1. *Statutory authority.* When an act is done under the authority of a Statute, the rule of strict liability does not apply.

Green v. *Chelsea Waterworks* Co., (1890) 70 L.T. 547. A main belonging to the defendant company which had statutory duty to maintain continuous supply of water, burst without any negligence on the part of the company. The water so released flooded the plaintiff's premises. *Held*, the company was not liable.

2. *Natural use.* If the damage caused is due to the natural use of the land, the defendant is not liable. If, for example, as a result of mining operation on one's land, a neighbour's land is inundated due to gravitational force, no liability attaches but if this inundation takes place due to pumping, the defendant is liable [*Smith* v. *Kenwick*, (1849) 7 C.B. 516].

3. *Act of God.* This was considered in detail earlier in connection with "General Defences to Tort".

4. *Wrongful act of third party.* If the harm caused is due to the act of a stranger (who is in no way under the control of the defendant), the defendant is not liable under the rule. The following case illustrates the point :

Box v. *Jubb*, (1879) 4 Ex. D. 76. A malicious third person blocked up the waste pipe of a lavatory basin on *A*'s premises. The water overflowed from the blocking so caused and flooded the premises of a neighbour, *B*. *Held*, *A* was not liable.

If the act of the stranger can be foresseen by the defendant and the damage can be prevented, the defendant must act and by due care prevent the damage. If he fails to act, he will be liable [*North-Western Utilities Ltd* v. *London Guarantee & Accident Co.*, (1956) A.C. 108].

5. *Plaintiff's own fault.* Where the thing escaped due to plaintiff's own default and caused a damage, the rule in *Rylands* v. *Fletcher* does not apply. Cockburn C.J. observed in *Dunn* v. *Birmingham Canal Co.*, (1872) L.R. 7 Q. B 244 :

"No action at law can be maintained for any injury which has been brought by the wilful and intentional act of the party complaining as its proximate and immediate cause, such act having been done by him with his eyes open, with the knowledge that the injury would be the probable consequence of the act so done by him."

Note the following cases in this regard :

Ponting v. *Noakes*, (1894) 2 Q. B. 291. There was a poisonous tree on *A*'s land. *B*'s horse intruded into *A*' s land and died after eating the leaves of the tree. *Held*, *A* was not liable as the damage was due to *B*'s own fault.

Marlor v. *Ball*, (1909) 16 T.L.R. 239. Some zebras of *B* which were properly tied up in a stable were flared up due to *A*'s stroking. As a result *A* was injured. *Held*, he could not recover damages.

6. *Consent of the plaintiff.* The rule of law is *volenti non fit injuria*, i.e., where there is consent, there is no injury. Where the plaintiff has consented to the accumulation of the dangerous thing on the defendant's land, he cannot sue if it escapes and causes some damage. For example, in highrise apartments, water is stored in tanks for the common use of tenants in the

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building living on different floors. If water escapes or leaks without any negligence on the part of the defendant, he is not liable. The rule of strict liability does not apply if the source of danger, *e.g.*, water tanks, gas pipes, electric wiring, etc., is maintained for the common benefit of both the plaintiff and the defendant [*Cartstairs* v. *Taylor*, (1871) L.R. 6 Ex. 217].

VICARIOUS LIABILITY

'Vicarious' means "done or undergone by one person for another or others". Thus when *P* is made liable for *A's* torts, the liability of *P is* vicarious liability.

Examples of vicarious liability. (a) A master is vicariously liable for the wrongful act done by his servant in the course of his employment.

(b) A principal is vicariously liable for the wrongful act of the agent in the course of performance of his duty as agent.

In these cases, the liability of the master and the principal is in addition to the liability of the servant and agent respectively.

(c) The partners of a firm are vicariously liable for the wrongful act of a partner done in the ordinary course of the business of the firm.

Principal and agent

Qui facit per alium facit per se (i.e., he who acts through another is acting himself) is the general principle. This, in other words, means that the *acts of the agent are the acts of the principal* provided the agent acts in the ordinary course of the performance of his duties as an agent. Thus if an agent commits a tort in the ordinary course of his agency, or by the authority of the principal, the principal is liable for the tort of the agent. Note the following case :

> *Lloyd* v. *Grace, Smith & Co.*, (1912) A.C. 716. *L*, who owned some cottages, and lent money on mortgage, wanted to dispose of these cottages. For this purpose she went to G.S. & Co.'s office, a firm of solicitors, where she met a clerk of G.S. & Co. The clerk fraudulently induced her to execute a mortgage in his favour, which she did. *Held*, the employers, *i.e.*, G.S.& Co., were liable for the fraud of the clerk as the fraud was committed in the course of employment.

But if the tort is committed by the agent outside the ordinary course of the agency and without the principal's authority, or if the agent is not acting on behalf of the principal when he commits a tort, the principal is not liable [*Rayner* v. *Mitchell*, (1877) 2 C.P.D. 357]. It should, however, be noted that the agent is always personally liable for a tort committed by him whether or not liability also attaches to the principal.

A principal is always liable for the tort committed by the agent where he authorised the agent to act on his behalf. He is also liable where he did not expressly or impliedly authorise a person to do some act on his behalf, but he subsequently ratifies the latter's act. Ratification is tantamount to prior authority.

Partners

The law as to partnership is a branch of the law of principal and agent. The liability of a partner for the acts of his co-partners is in truth the liability of a principal for the acts of his agent [*Cox* v. *Hickman*, (1860) H.L.C. 268). All

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the partners (including the guilty partner) are liable for the tort committed by any partner in the ordinary course of the business of the firm. Sec 26 of the Indian Partnership Act, 1932 also specifically provides in this regard as follows :

> "Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner."

Examples. (a) *H*, a partner in a firm, whose business it was to obtain by legitimate means information about the business contracts of competitors, bribed the clerk of a rival to give secret information about his master's customers and prices. Consequently the rival lost business to the tune of £ 750. *Held*, the firm was liable [*Hamlyn* v. *Houston* & Co., (1903) 1 K.B. 81]

(b) The managing partner of a coal mine was guilty of personal negligence in omitting to have the shaft of the mine properly guarded as required by law. As a result of this default a workman fell into pit and was injured. *Held*, the firm was liable [*Mellors* v. *Shaw*, (1861) B. & S. 437].

(c) *A* appointed a firm, consisting of partners *B* and *C*, to buy and sell wine for him on commission. *A* left money with the firm for the purpose. *B*, the active partner, rendered false accounts of purchase and sale to *A* and misappropriated the money. *Held*, the firm was liabale to [*A. Rapp* v. *Latham*, (1819) 21 RR 49].

According to Sec. 25 of the Indian Partnership Act, 1932 every partner is liable, jointly with all the other partners and also severally, for all acts of the firm while he is a partner. Sec. 27 of this Act also makes the firm liable for misapplication of money or property received by a partner of the firm in the ordinary course of business. According to it, where—

(a) a partner acting within the scope of his apparent authority receives money or property from a third party and misapplies it ; or

(b) a firm in the course of its business receives money or property from a third party, and the same is misapplied by any of the partners while it is in the custody of the firm ;

the firm is liable to make good the loss.

Examples. (a) *M* applied to *R*, a member of a firm of solicitors, to raise a loan on the mortgage of his freehold estate. *R* arranged for the loan but falsely informed that the lender required some additional security. *M* accordingly deposited with *R* some share warrants payable to the bearer. *R* subsequently sold the share warrants, misappropriated the proceeds and absconded. *Held*, the other partners were liable for the misappropriation as *M*'s share warrants came into hands of *R* when he was acting within the apparent scope of his authority [*Rhodes* v. *Moules*, (1895) 1 Ch. D. 236].

(b) A partner of a firm of bankers disposed of certain securities deposited with it by a customer for safe custody. *Held*, all the partners (including the dormant partner) were liable [*Devaynes* v. *Noble*, (1816) 1 Mer. 572, 579].

Master and servant

A servant is a person who acts under the direct control and supervision of his master or employer. He is bound to follow all reasonable orders given to him in the course of his employment. The employer is liable for the tort of

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his servant committed by him in the course of his employment. The servant is also liable along with the employer ; their liability is joint and several. The plaintiff has the choice to bring an action either against the employer or the servant or both. The maxim *'qui facit per alium facit per se'* which means 'He who does an act through another is deemed in law to do it himself" applies in case of master-servant relationship also.

Independent contractor

A servant is employed by an employer to perform certain services in connection with the affairs of the employer. He is subject to the control and supervision of his employer as regards the manner in which the work is to be done. An independent contractor, on the other hand, is employed to act for another but he does the work independently of the employer's control or interference. He undertakess to produce a given result, but in the actual execution of the work he is not under the order or control of the person for whom he does it. He may use his own discretion in things not specified beforehand.

As a general rule, an employer is liable for the torts of his servant but he is not liable for the torts of an independent contractor.

Examples. (a) A engages *B* as a driver for his car. While driving the car, *B* negligently knicks down *C*. *A* is liable to *C* as *B* is his servant.

(b) A is a reporter on the staff of a newspaper. He publishes a libel against *B*. The management is liable to *B* as *A* is a servant.

(c) X hires a taxi to go to his office. On way, an accident takes place and *Y* is knocked down. *X* is not liable because the taxi driver is not *X*'s servant. The taxi driver is an independent contractor and is liable to *Y*.

(d) A engages an electrician to repair his fan. The stair on which *X*, the electrician's man, was standing, slipped and *X* got seriously injured. *A* is not liable to *X* as the electrician is not his servant but an independent contractor.

(e) M was on a lawful visit to *N*'s premises. He fell down from an open lift shaft and was seriously injured. The lift had been entrusted to the care of *0*, an independent contractor, *Held, N* was not liable for the negligence of *0* [*Morgan* v. *Incorporated Central Council*, (1936) 1 All E.R. 404].

Liability of employer for the torts of independent contractor

As a general rule, an employer is not liable for the torts of an independent contractor even if they are committed in the course of his employment as an independent contractor. However, in the following cases, he is liable for the torts of an independent contractor :

(1) *In torts of strict liability.* An employer is liable for the act of an independent contractor in case of strict liability [*Rylands* v. *Fletcher*, (1868) L.R. 3 H.L. 330].

(2) *In cases of instigation.* If an employer instigates the independent contractor to commit a tort or authorises some nuisance, he is liable for the torts of the independent contractor.

Examples. (a) A gas company, which had no legal power to dig up any street, employed an independent contractor to dig up a street. *E* fell over the heap of earth and got injured. *Held*, the gas company was liable as it had authorised the nuisance [*Ellis* v. *Sheffield Gas Consumers Co.*, (1853) 2 E. & B. 767].

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(b) A passenger instigates a taxi driver to drive fast. The taxi driver knocks down a man while crossing a bend negligently. The passenger is jointly liable with the taxi driver.

(3) *In case of negligence of independent contractor.* Where the risk of harm is apparent and can be foreseen, the employer must take precaution that he appoints a competent independent contractor. If he does not do so, he is liable in negligence for the damage caused by the acts of the contractor.

Tarry v. *Ashton*, (1876) Q. B.D. 314. *A* got affixed on the outside of his house a lamp through an independent contractor. The lamp which was overhanging on the footway adjoining *A*'s house was negligently affixed. It fell down and injured a passerby. *Held*, *A* was liable as it was his duty to see that the job was rightly done and that the lamp was reasonably safe.

Likewise, if there are any structural defects in buildings, or in railway bridges, or in installation of electric poles, the plea that the work was done by independent contractors will not absolve the defendants of their liability.

(4) *In case of legal or statutory duty.* Where there is a legal or statutory duty inposed on an employer, he is liable for the torts of an independent contractor as he cannot escape duty by delegating it to the independent contractor.

(5) *Under the Workmen's Compensation Act, 1923.* If an employer employs a contractor in order to engage some workmen, a workman is entitled to claim compensation from the employer.

Liability of master for the acts of servants

(1) *A master is liable for all the acts of the servant done in the course of his employment.* An act is deemed to be done in the course of employment if it is either—

(a) a wrongful act authorised by the master, or

(b) a wrongful and unauthorised mode of doing some act authorised by the master. It makes no difference whether the act was authorised by the master or not, or whether the act was for the master's benefit or not, or whether the act was done negligently, wantonly or even wilfully ; the master is liable if the act is within the scope of the servant's employment. If, however, an act is beyond the scope of the servant's employment, the master is not liable unless he has expressly authorised the act or subsequently ratified such act. Note the following cases :

Bayley v. *Manchester, Sheffield & Lancashire Rail.*, (1873) L.R 7 C.P. 415. A railway company employed a porter to see that the passengers were helped to board the right trains. *A* was travelling in a right train for his journey. The porter erroneously thought that he was on a wrong train. He, therefore, pulled him out and injured him. *Held, the* railway company was liable.

Century Insurance Co. v. *Northern Ireland Road Transport Board*, (1942) A.C. 509. *A*, a driver of a petrol lorry, was *B*'s servant. While transferring petrol from a lorry to an underground tank, he struck a match to light a cigarette and threw it when it was still alight on the floor. This caused a fire which damaged *C*'s property. *Held*, *B* was liable for the damage caused as the act was done in the course of the servant's employment thoug! it was done in a negligent manner.

Gregory v. *Piper*, (1829) 9 *B* & C. 591. *A* ordered his servant *B* to throw some rubbish near the wall of a neighbour. The rubbish damaged the neighbour's wall.

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Held, A was liable for the act of his servant although he had instructed him to take precaution that the rubbish did not touch the neighbour's wall. This was because the act of the servant was within the scope of his employment.

Limpus v. *London General Omnibus Co.*, (1862) 1 H. & C. 526. The owner of a bus company gave printed instructions to the drivers not to race with or obstruct other omnibuses, but still one of the drivers one day wrongfully overtook an omnibus and caused an accident. *Held*, the master was liable as the act of the driver was in the course of his employment and the prohibition only related to the mode of doing the act. Wiles J. said in this case: "The law is not so futile as to allow the master by giving secret instructions to discharge himself from liability."

Nalini Ranjan Sen v. *Corpn. of Calcutta*, A.I.R. (1926) Cal. 87. The driver of a car who was taking it to a workshop for repairs left it in the charge of the cleaner. The cleaner was forbidden to drive the car ; but still he drove the car in the absence of the driver and damaged a lamp-post of the Municipality. *Held*, the master (the owner of the car) was not liable for the act of the cleaner as his act of driving was outside the scope of his appointment.

Sitaram v. *Santanuprasad*, A.I.R. (1966) S.C. 1697. The driver of a car handed it over to the cleaner for taking a driving test. When the cleaner was driving, he took a sudden turn without giving signal and injured a pedestrian. *Held*, the master was not liable as the act of the cleaner was outside the scope of his employment.

Conway v. *George Wimpey & Co.*, (1950) 2 K.B. 331. A driver was forbidden to carry any outsiders in his master's car. He gave a lift to a friend who was injured by the driver's negligent driving. *Held*, the master was not liable as the act of the driver was outside the scope of his employment ; it was only a private frolic or deviation.

(2) *A master is liable for the frauds or wrongs committed by a servant in the course of his business* whether the fraud was for the master's benefit or not, if it was committed by the servant in the course of his employment. There is no difference in the liability of a master for wrongs whether for fraud or any other wrong committed by a servant in the course of his employment, and it is a question of fact in each case whether it was committed in the course of the employment [*State Bank of India* v. *Shyama Devi*, A.I.R. (1978) S.C. 263].

United Africa Company Ltd v. *Saka Owoade*, (1955) A.C. 716. The appellant company, general merchants, gave to servants of the respondent, a transport contractor, goods for carriage by road. The servants stole the goods and the evidence established that the theft had taken place during the course of their employment. *Held*, the respondent was liable to the appellants for the value of the goods.

(3) *A master is also liable for the mistake or negligence of the servant* in the performance of his duties in the course of his employment.

(4) *Where a servant instead of performing his duty, negligently delegates his authority* and allows it to be negligently performed by another person, the master is liable for the negligence of the servant.

Ricketts v. *Thomas Tilling Ltd.*, (1915) 1 K. B. 644. The driver of a bus permitted the conductor to drive the bus. The conductor drove the bus negligently and knocked down a pedestrian. *Held*, the master was liable for the negligence of the driver in permitting the conductor to drive the bus.

No liability of the master

A master is not liable to a third party for the wrongful acts of his servant if—

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(a) the case of the loss or damage arose without his actual fault or privity and without the fault or neglect of his agents or servants in the course of their employment ;

Beard v. *London General Omnibus Co.*, (1900) 2 Q. B. 530. The driver of a bus at the end of a journey left it to the care of the conductor and went to take his dinner. During the absence of the driver, the conductor negligently caused an accident while he was trying to turn round the bus to make it ready for the next journey. The conductor was not permitted or authorised to drive the bus. *Held*, the master was not liable as the driver acted out of the course of his employment as the driving was not the kind of the act which the conductor was authorised.

(b) the servant does the act in defiance of express prohibition and the act is outside the course of his employment.

Twine v. *Beans Express Ltd.*, (1946) 1 All E.R. 203. *A* provided a commercial van for the use of a bank. He put up two notices on the van : One, that no unauthorised person was allowed to take a lift in the van, and two, that the driver had been expressly instructed not to allow unauthorised persons in the van and that *A* would in no case be liable for the damage caused to the unauthorised persons. The driver nevertheless gave lift to an unauthorised person who was killed in an accident caused by the driver's negligence. *Held*, *A* was not liable as the driver's act was outside the scope of his employment.

Where the servant is temporarily lent to another person, the master is liable provided the master even after lending the servant has control and superintendence over the servant, *i.e.*, what the servant is to do and how that is to be done.

Mersey Docks & Harbour Board v. *Coggins & Griffth (Liverpool) Ltd.*, (1947) A.C. 1. A Harbour Board owned a number of mobile cranes which were handled by skilled drivers employed and paid by it. It let out a crane to a stevedoring company along with a driver, for loading a ship. The power to dismiss the driver remained with the Harbour Board. The driver was, however, under the control of the stevedoring compnay as to which particular cargo was to be loaded. Due to the negligent handling of the crane by the driver while loading the ship, *X* was injured. *Held*, the Harbour Board was liable to X.

Master's liability to the servant

A master is liable to the servant for injuries caused to him in the course of his employment.

(1) *At Common Law.* At Common Law the rule is *'Volenti non fit injuria'* which implies that one is not entitled to damages if one has volunteered to take a risk of injury. If a workman knew the type of risks which he was running while working for an employer for wages, the employer was not liable to pay compensation for injuries. This doctrine was abolished in England by the Law Reforms (Personal Injuries) Act, 1948.

The doctrine, however, applies in India. In *Governor-General-in-Council* v. *Constance Zena*, A.I.R (1950) P.C.22, the Privy Council held that the doctrine of common employment was applicable in India, although its scope has been limited by the Employees' State Insurance Act, 1948 and the Personal Injury (Compensation Insurance) Act, 1963.

The doctrine of common employment. This doctrine provides that the employer is not liable to pay compensation to a workman for injury when—

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(a) he is working with several persons for a common purpose, and

(b) he is injured by some act or omission of some of the persons of his group, *i.e.*, his fellow servants.

Priestly v. *Fowler*, (1883) 3 M & W. 1. A who was *B*'s servant was injured due to breaking down of an overloaded carriage which was in charge of C, another servant of *B*. *Held*, *B* was not liable as *A* and *C* were in the common employment of *B*.

(2) *Under the Employer's Liability Act*, 1938. Sec. 3 of this Act provides that an employer cannot plead the defence of the common employment where personal injury is caused to a workman due to —

(i) the omission of the employer or any person in the service of the employer to maintain in good and safe condition anyway, works, machinery or plant connected with or used in his trade or business ; or

(ii) the negligence of any person in the service of the employer who is in charge of any superintendence, whilst in the exercise of such superintendence ; or

(iii) the negligence of any person in the service of the employer whose orders or directions, the workman at the time of injury was bound to conform at the time of injury ; or

(iv) any act or omission of any person in the service of the employer, done or made *(a)* in the normal performance of the duties, or *(b)* in obedience to any rule or by-law of the employer, or *(c)* in obedience to particular instructions given by any other person authorised by employer to do so.

Sec. 3-A of the above Act provides that any agreement excluding or limiting any liability of the employer in respect of personal injuries caused to a workman as per Sec. 3 of the Act is void.

The Personal Injuries (Compensation Insurance) Act, 1963 also imposes on employers a liability to pay compensation to workmen sustaining personal injuries and to provide for the compulsory insurance of the employers against such liability.

(3) *Under the Workmen's Compensation Act, 1923.* Under this Act, an employer is liable to pay compensation to a workman if personal injury is caused to him by accident arisisng out of and in the course of his employment. The Act also enables a workman to get compensation irrespective of his negligence. It also lays down the various amounts payable in case of an accident depending upon the type and extent of injury. The employer knows the amount of compensation he has to pay and is saved of many uncertainties to which he was subject before the Act of 1923 came into force.

VICARIOUS LIABILITY OF THE STATE

Position in England

At one time in England the maxim of the Common Law was that "the king can do no wrong," and as such the Crown could not be sued for the tortious acts of its servants. The individual wrong-doer (i.e., the official) was personally liable for the wrong committed by him, even when the wrong was actually authorised by the Crown or was committed in the course of his employment. Obviously, the position thus obtained was inequitable and incompatible. The Crown, as a matter of grace, would defend the

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actions brought against its servants in respect of torts committed by them in the course of their employment and in some cases the judgment against a servant was satisfied from the Treasury. With the expansion in the activities of the State, it became necessary that the State should shoulder liability for the acts of its servants without claiming any special immunity. With this object in view the Crown Proceedings Act, 1947 was passed. Now like a private employer, the Crown is liable for the torts committed by its servants in the course of their employment. Sec. 2 (1) of this Act provides thus :

"Subject to the provision of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject :

(a) in respect of torts committed by its servants or agents ;

(b) ....."

Position in India

Article 300 of the Constitution. The legal position of State as regards its liability for the tortious acts of its servants done in course of their employment is stated in Article 300 of the Constitution of India. The Article provides that the Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs. Further the Union of India and the State Governments can sue or be sued in the like cases as the Dominion of India and the corresponding Indian States might have sued or been sued if Constitution had not been enacted.

Government of India Act. 1935. The legal position of the State before the Constitution came into force is to be found in the Government of India Act, 1935 which again like the Constitution, said that the position prevailing before the Act of 1935, *i.e.*, position as obtaining under the Government of India Act, 1915, shall prevail. The Act of 1915 in a like manner made reference to the Government of India Act, 1858. The Act of 1858 made it clear that the Government was liable for acts of its servants in those cases in which the East India Company would have been liable.

East India Company. The East India Company was held to be liable for tortious acts of its servants which were done in the excercise of its non-sovereign function, *i.e.*, the function which could have been performed by a private individual. It was held not to be liable for a tort committed by its servants if the act was done in excercise of sovereign power. The question of liability of the East India Company was considered in the following case :

Peninsular & Orientet Steam Navigation Co. v. *Secretary of State for India,* (1861) 5 Bom.H.C.R. App. 1. In this case the plaintiff's horse was injured by the negligence of the servants of the Government. These were engaged at the time of the injury in carrying along a public road a heavy piece of iron for being placed on board a steamer. The plaintiff filed a suit against the Secretary of State for the recovery of damages. *Held,* the Government was liable as the act in question was not being done in the excercise of any governmental or sovereign function. Peacock C.J. observed in this case :

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"There is a great and clear distinction between acts done in excercise of what are usually termed sovereign powers and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them. Where the act is done or a contract is entered into, in the excercise of powers usually called sovereign powers, no action will lie."

The following cases further clarify the position :

State of Rajasthan v. *Vidhyavathi*, A.I.R.(1962) S.C. 933. The driver of a Rajasthan Government's jeep which was meant for the use of the Collector was taking it from the repair shop to the Collector's residence. On way, owing to rash and negligent driving, a pedestrian was knocked down and killed. The widow of the victim sued the Government for damages. *Held*, the State Government was vicariously liable for the tortious acts of its servants, like any other employer.

Fatima Begum v. *State of Jammu & Kashmir*, (1976) ACJ 194. A truck belonging to the Government Transport Undertaking knocked down a cyclist while it was engaged in transporting police personnel from the place of duty to barracks. The Jammu and Kashmir High Court rejected the defence plea of sovereign immunity and held that the State Government was liable.

Iqbal Kaur v. *Chief of Army Staff*, A.I.R. (1978) All. 417. An accident occured due to the negligent driving by a sepoy of the Government while he was going with a truck for imparting training in motor driving to new recruits. *Held*, the act did not constitute an act in excercise of sovereign power and the driver and Union of India were liable for damages.

Union of India v. *Savita Sharma*, A.I.R. (1979) J. & K. 6. Soldiers were being transported in an army vehicle. Negligence on the part of its driver resulted in an accident to a private tempo. An occupant of the tempo was injured in the accident. *Held*, the State was liable for damages.

State of Tamil Nadu v. *M.N. Shamsudeen*, (1981) ACJ 244. The death of a person was caused by an ambulance belonging to the Government which was being used for transporting a patient for emergent treatment. The Madras High Court disallowed the protection of immunity on the ground that transporting of the patient to the hospital could be done even by private individulas.

Surjit Singh Bhatia v. *Segalla Ramulu*, (1983) ACJ 603. A military vehicle dashed against a motor cycle and caused injuries to the pillion rider. The Punjab & Haryana High Court rejected the plea of sovereign immunity.

Union of India v. *Hardeo Dutta Tirtharam*, A.I.R. (1986) Bom. 350. A driver of a military truck while collecting tents from an outdoor training place and bringing them to the regiment knocked down a Subedar. The Bombay High Court took the view that since the particular duty the driver was carrying out in the military area could have very well been carried out by any other private truck, sovereign immunity could not be claimed.

State of Orissa v. *Amruta Dei*, A.I.R. (1987) Ori.217. A Government jeep belonging to Regional Transport Office and occupied by officers and assistants of the department was returning late at night after checking duty. It was being driven by an officer when it met with an accident. The driving officer and two assistants were killed in the accident. *Held*, the Government was liable and it could not claim immunity on ground that accident took place while jeep was engaged in discharging sovereign functions.

In the case of *State of Orissa* v. *Padmalochan Pande*, I.L.R. (1974) Cut. 103, a Bench of the Orissa High Court on a reference to various decisions in

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motor accident cases culled out the following principles for determining the question of sovereign immunity :

1. Sovereign powers mean powers which can be lawfully excercised only by a sovereign or by a person by virtue of delegation of sovereign powers.

2. The sovereign function of the State must necessarily include the maintenance of the army, various departments of the Government for maintenace of law and order and proper administration of the country which could include magistracy and the police and the machinery for administration of justice.

3. Where the employment in the course of which a tortious act is committed is of such a nature that any private individual can be engaged in it, then such functions are not in excercise of sovereign power.

4. The Government is vicariously liable for tortious acts of its servants which have not been committed in excercise of sovereign functions.

5. The Union and the States are liable for damages for injuries caused by their servants if such injuries would render a private employer liable.

6. The Government is not liable for torts committed by its servants if the acts were done in exercise of sovereign power.

Summing up : The position of the State as regards its liability for the tortious acts of its servants may now be summed up as follows :

1. The liability of the Government, *i.e.*, the Union of India and the States, for the tortious acts of its servants is the same as was that of the East India Company.

2. The Union and the States are not liable for the torts committed by its servants in excercise of sovereign powers or functions.

3. The Union and the States are liable for the torts committed by their servants in excercise of non-svereign function, *i.e.*, in cases in which a private employer would be liable.

4. Sovereign powers mean powers which can be lawfully exercised only by a sovereign or person to whom such powers have been delegated.

5. The task of distinguishing between sovereign and non-sovereign functions is by no means easy.

A simple test to determine a non-sovereign function is as follows : Can a private individual engage in it ? If yes, it is a non-sovereign function. Thus functions relating to trade, business, commerce and the welfare activities are non-sovereign functions. Sovereign functions include the maintenance of defence forces, various departments of the Government for maintenance of law and order and proper administration of the country and machinery for administration of justice.

PART II—SPECIFIC TORTS

According to Winfield, torts may be classified into the following groups :

1. Wrongs to person. These include :
   (1) Death.
   (2) Assault and battery.
   (3) False imprisonment.
   (4) Residuary trespass to the person.

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(5) Injuries affecting family relations as between—
   (a) Husband and wife.
   (b) Parent and child.

2. Wrongs to reputation (defamation, including slander and libel).
3. Wrongs to property. These include—
   (1) Trespass to land.
   (2) Conversion and other wrongs to chattel.
4. Wrongs to person or to property which include—
   (1) Deceit.
   (2) Negligence.
   (3) Nuisance.
   (4) Conspiracy.
   (5) Breaches of strict duties.
5. Wrongs of interference with freedom of contract or business.
6. Abuse of legal procedure. This covers—
   (1) Malicious prosecution.
   (2) Maintenance and champerty.

Sir Henry Finche gives the classification of torts given in the chart on the next page.

In this Part we shall be discussing the various torts under the following heads :

I. Torts to person.
II. Torts to property.
III. Torts to person and property.

1. TORTS TO PERSON

When as result of a civil wrong, injury is caused to the person of an individual or his reputation, an action for damages lies. These wrongs include :

Battery

Battery may be defined as the *intentional application of physical force to* another person without his consent or lawful justification. There are two essential requirements of a tort of battery, *viz.*,

(1) *Use of force.* To constitute battery, it is essential that there must be use of some force. It makes no difference even if the force used is very trivial causing no harm, and even if there is no bodily contact with the aggressor, *i.e.*, the person using the force.

Examples. (a) A slightly touches *B* in anger. This is battery [*Cole* v. *Turner*, (1704) 6 Mad. 149].

(b) A throws a squib at *B*. This is battery [*Scott* v. *Shephered*, (1773) 2 W.B 892].

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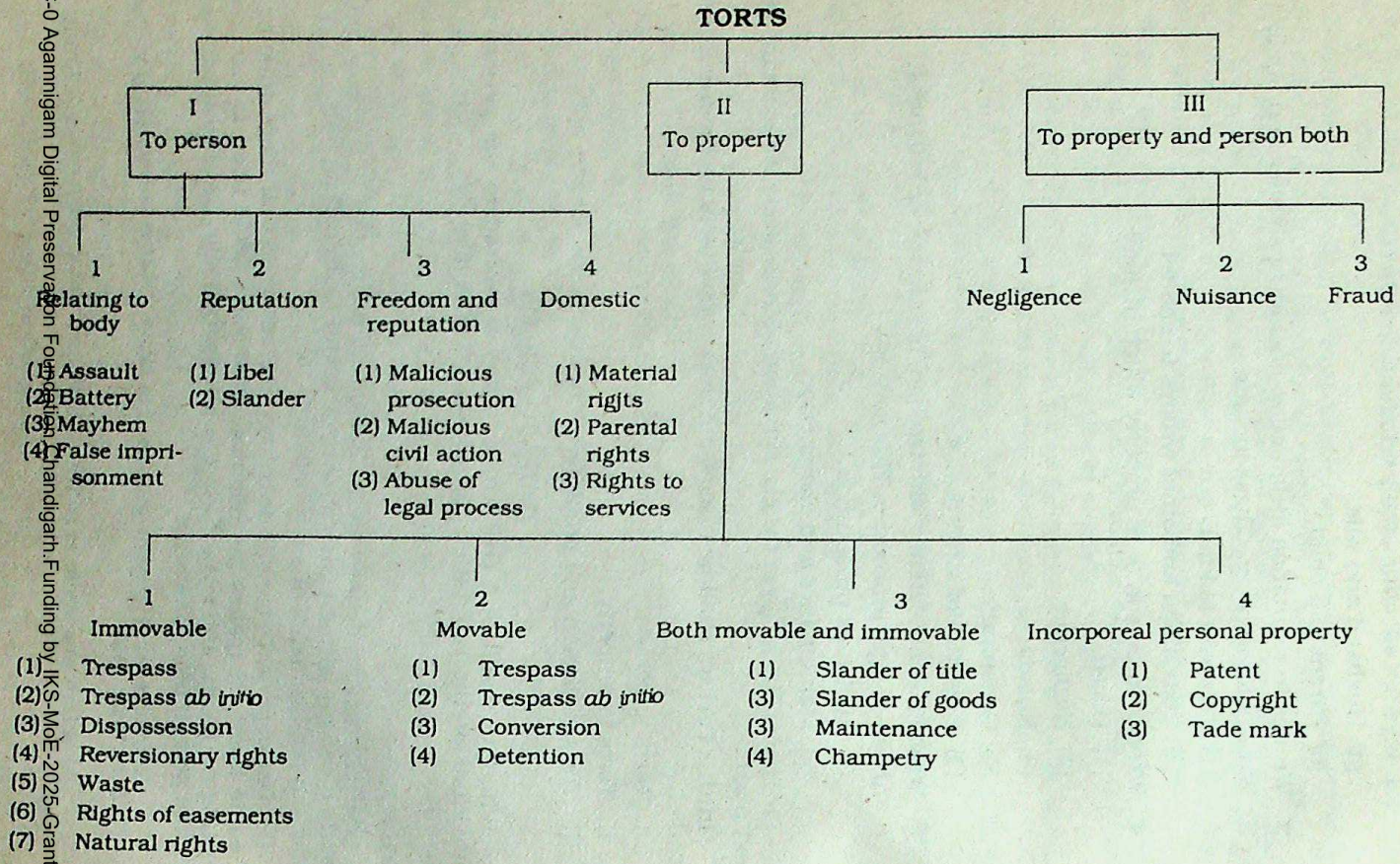

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(c) *A* hits *B* by throwing a stone at him. This is battery even if *A* has not touched *B*.

(d) *A* spits in *B*'s face. This is battery.

(e) While *A* is sitting into a chair, *B* pulls the chair from under him. As a result *B* falls. This amounts to battery.

(f) *A* causes *B* to be medically examined against his will. This amounts to battery.

Mere passive obstruction, however, does not constitute use of force. Note the following case :

Innes v. *Wylie*, (1844) I.C. & K 257. *A* was unlawfully prevented from entering the club premises by a policeman who did not touch or threaten *A*. *Held*, there was no assault or battery as the policemen was entirely passive like a door or a wall put to prevent the plaintiff *(i.e., A)* from entering the room.

(2) *Without lawful justification.* For the tort of battery, it is essential that the use of force must be intentional and wilful and without any lawful justification. In *Cole* v. *Turner*, (1704) 6 Mad. 149, it was observed by Holt, C.J. that if two or more persons meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery. But if either of them uses violence against the other, to force his way in a rude inordinate manner, it will be a battery. But merely touching a person in a friendly way to draw his attention is not battery. Similarly, a friendly pat on the back of a person is not battery.

Battery is actionable *per se*, *i.e.*, without proof of harm or damage. If harm is caused by accident and without any intention on the part of the defendant, no cause of action lies against the defendant.

Examples. (a) A horse which got frightened by an accidental fall of a building, knocked down *B*. The owner of the horse who was riding it at the time of the accident is not liable for the tort of battery.

(b) *P*, who was one of the members of a shooting party, fired at a pheasant, but the pellet from gun glanced off the bough of a tree and accidentally hit *S*, another member of the party. *Held*, *P* was not liable [*Stanely* v. *Powell*, (1891) 1 Q.B.86].

Assault

Assault is an act of one party (the defendant) which puts another person (the plaintiff) in a reasonable fear of an immediate battery by means of a threat by the former (the defendant) to commit a battery. The act, which may be a gesture of bodily movement, must cause a reasonable apprehension of the infliction of a battery on the plaintiff by the defendant. But mere threatening words are not enough to constitute the offence of assult. They must result in a reasonable fear on the part of the plaintiff. Thus if the defendant makes an attempt to cause the harm to the person of the plaintiff and has at the time of making such attempt the capacity to do so, although no harm be actually caused, it is an assault.

In *Cobbet* v. *Grey* (1849-50) 4 Ex. 729, it was observed by Pollock C.J.:

"If you direct a weapon, or if you raise your first, within those limits which give you the means of striking, that may be an assault ; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault,' I think that is not an assault."

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Sec. 351 of the Indian Penal Code, 1860 defines 'assault' as follows :

"Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that festure or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation. Mere words do not amount to an assault. But the words which a person uses may give to his gesture or preparation such meaning as may make those gestures or preparations amount to an assault."

Examples. (a) Pointing a pistol, whether loaded or unloaded, towards the plaintiff is an assault ; but if the pistol is unloaded and the plaintiff knows it, there is no assault [*Blake* v. *Barnard*, (1840) 9 C.& P. 626].

(b) *A* aims a blow at *B*. The blow is intercepted by *C*. An assault has still been committed. If the blow strikes *B*, it would amount to battery.

(c) *A* advances towards *B* with clenched fists but is stopped by *C*. An assault has been committed.

(d) *A* intended to strike *B* with a whip. He pursued him with the whip in his hand. *B* however escaped. Held, there was an assault [*Martin* v. *Shoppe*, (1823) 3 C.& P. 373].

(e) *A*, during a quarrel with *B*, half draws his sword and says: " If it were not assize time, I would not take such language from you." *Held*, there was no assault as A had no intention of striking B [*Tubeville* v. *Savage*, (1969) 1 Mad. 3].

(f) In a Parish meeting, a number who was interrupting the proceedings of the meeting was ordered by the Chairman to leave the meeting. He got agitated and advanced towards the Chairman with a clenched first saying that he would pull the Chairman out of the chair. He was however stopped by other members. *Held*, he was liable for assault [*Stephens* v. *Myers*, (1830) 4C.& P. 349].

(g) *A* who is in a train moving out of station shakes his fists at *B* who is on the platform. There is no assault as the distance is such that the threat cannot be carried out.

Usually, assault precedes battery. To throw water at a person is an assault ; if any drop falls upon him, it is battery. Pulling chair from under a person who is in the process of sitting into it is assault; when his body touches the ground, it will be battery. But when a person is hit from behind, there is battery and it is not preceded by any assault.

Defences to an action for assault and battery. The defences to an action for assault and battery may be—

(1) in self-defence or defence of property provided the force used is reasonable and absolutely necessary.

(2) for lawful excercise of parental or quasi-parental authority.

(3) for preservation of public property.

False imprisonment

False imprisonment involves a total restraint or complete deprivation of the liberty of another for some period, however short, without sufficient or lawful justification or excuse. The word false does not mean fallacious but

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'erroneous' or 'wrong'. 'Imprisonment' also does not mean, as commonly understood, putting a person in prison. It is the restraint of a man's liberty whether it be in the open field or in his own house or in the common gaol. If the person restrained is deprived of his personal liberty of freely going at all times to all places where he will, he is wrongfully imprisoned. The restraint may be either physical, *i.e.*, when the prisoner is confined within a define space by being put under lock and key or by mere show of force or authority.

Examples. (a) A tells *B* that he has a warrant against *B* and *B* accompanies him. This constitutes imprisonment (though *B* is not confined within a definite space) because *B*'s liberty has been jeopardised.

(b) A, a man of power, asks *B* to stand in the sun. Fearing that *A* might beat him, *B* obeys the order. This amounts to false imprisonment.

False imprisonment thus amounts to a restraint on the personal liberty of another and an action lies in the Court for this offence. But to constitute this offence, two essentials are necessary :

(1) *There must be a total restraint of the liberty of the plaintiff.* To amount to false imprisonment, the restriction on the liberty or freedom of movement of a person must be total, *i.e.*, in all directions. If he is prevented from going to a particular direction but is free to go back or to any other direction, there is no false imprisonment. Note the following case in this regard :

Bird v. Jones, (1845) 7Q.B. 742. The defendants erected a barricade on a public pathway on a bridge and put some seats in the space wrongfully enclosed for viewing a boat race. The plaintiff claimed to excercise his right of way. In excercise of this right he climbed over the barricade. He was prevented from proceeding in the direction of the enclosed space but he was allowed to go back. He, however, remained there for half an hour and subsequently brought an action for false imprisonment, *Held*, there was no false imprisonment as the restraint on the plaintiff was not total.

In another case, (reported in the Times of India, 10th Novemeber, 1978), 3 Greeks kept their sister, Eleni Karyoti, locked in a dark celler for almost 30 years after a love affair which the family considered a scandal. Eleni, aged 47, was found naked and jibbering in the celler and was reduced to the level of an animal. The brothers were charged with causing Eleni with bodily harm and false imprisonment.

Gherao. It means encircling of an area physically by some people so that the persons inside the area are not allowed to move out or function as they may like, till the demands of the people gheraoing the area are met. This is an extra-judicial method of extorting concessions. In *Jay Engg. Works* v. *State of West Bengal*, A.I.R. (1968) Cal. 407, it was held that an action of gherao was tortious as it involved false imprisonment.

Knowledge of the plaintiff. Knowledge on the part of the plaintiff that he has been imprisoned is not necessary for bringing an action for false imprisonment. In *Meering* v. *Graham-White Aviation Co. Ltd.*, (1920) 122 L.T.44, it was observed by Atkin L.J. as follows :

"It appears to me that a person could be imprisoned without his knowing it. I think that a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is lunatic. These are cases where it seems to me that the person might properly complain if he were imprisoned,

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though the imprisonment began and ceased while he was in that state. Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not."

(2) The restraint should be without any lawful justification to constitute the wrong of false imprisonment. If there is justification, there is no false imprisonment.

Volenti non fit injuria. If there is *volenti non fit injuria* on the part of the plaintiff *(i.e.,* where there is voluntary confinement), there is no false imprisonment and the defendant is not liable. The following case illustrates the point :

Herd v. *Weardale, Steel Coal & Coke Co.,* (1915) A.C. 67, A miner went down a mine in an electrically driven shaft at 9.30 a.m. to work therein in accordance with the terms of his employment. He stopped working much before the fixed time as he found the job to be dangerous and wanted to be taken to the surface at 11 a.m. He was, however, allowed to use the shaft at 1-30 p.m. *Held,* there was no false imprisonment.

The remedies available to the plaintiff, *i.e.,* the person wrongly imprisoned or detained, are (1) self-help, (2) writ of *habeas corpus* under Article 32 or 226 of the Constitution, and (3) action for damages.

Malicious prosecution

Malice in common acceptation means 'ill-will or hatred' against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. It signifies the presence of some improper and wrongful motive [*State of Bihar* v. *Rameshwar Prasad,* A.I.R. (1980) Pat. 267]. 'Prosecution' consists in setting judicial proceedings in motion. Malicious prosecution consists in instituting unsuccessful judicial proceedings (usually criminal, bankruptcy or liquidation) against another person, without reasonable and probable cause (or out of malice, *i.e.,* ill-will, hatred or even mischief). Malice and absence of reasonable and probable cause must unite in order to produce liability for malicious prosecution.

Example. A makes a false report to police that *B* has stolen his goods with a view to compelling *B* to deliver some property to him. The police arrest *B* and take him into custody. Here *B* has not been deprived of his liberty by *A. A* cannot, therefore, be sued for false imprisonment, but he may be used for the tort of malicious prosecution when the prosecution results in damage to the reputation or personal freedom or property of *B.*

The law generally encourages people to bring criminals to justice by setting the law in motion, *i.e.,* by instituting proceedings against them. If the machinery of law is set in motion for improper purposes, *e.g.,* alleging false charge against innocent persons, an action for tort of malicious prosecution will lie. But in order to succeed in a suit for malicious prosecution, the plaintiff must prove. :

(1) *That there was a prosecution of the plaintiff by the defendant, i.e.,* the defendant instigated and was instrumental in setting the criminal law in motion [*Pannalal* v. *Srikrishna,* A.I.R. (1955) M.B. 124].

(2) *That the prosecution terminated in favour of the plaintiff.* The terminiation will be in his favour if he is acquitted, discharged, or the proceedings have been discontinued or quashed for some defect or set aside on appeal.

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(3) *That the defendant acted without reasonable and probable cause for* that prosecution. Reasonable and probable cause means a genuine belief, based on reasonable grounds that the proceedings are justified In *Hicks* v. *Faulkner*, (1878) 8 Q.B.D. 167 Hawkins, J. stated :

> "I should define reasonable and probable cause to be honest belief in the guilt of the accused, based upon a full conviction, founded on reasonable grounds, the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinary, prudent and cautious man, placed in the position of the accused, to the conclusion that the person charged was probably guiltly of the crime imputed."

In *State of Bihar* v. *Rameshwar Prasad*, A.I.R. (1980) Pat. 267 Sinha J. observed :

> "Reasonable and probable cause means a genuine belief, based on reasonable grounds, that the proceedings are justified. The defendant in an action for malicious prosecution is not required to believe that the accused is guilty ; it is enough if he believes there is reasonable and probable cause for a prosecution. He need only be satisfied that there is a proper case to lay before the Court".

(4) *That prosecution by the defendant was malicious* and was actuated by private spite and animosity, and not to further the end of justice or vindicate the law.

> *Kamta Prasad Gupta* v. *National Buildings Corpn. Ltd.*, (1992) Del, 275. An officer in charge of a testing laboratory was terminated of his services, when some other officer found certain articles missing while an inventory of stock registers was taken. The prosecution under Sec. 409 of the Indian Penal Code, 1860 took place and it was held that this prosecution was not without reasonable or probable cause and therefore was not malicious.

(5) *That the plaintiff suffered damage as a result of the prosecution.* It was observed by Holt C.J. in *Savill* v. *Roberts*, (1699) 1 Raym. that three-fold damage may be caused to the plaintiff as a result of the prosecution :

> "*First*, damage to a man's fame as if the matter where of he is accused is scandalous ; *second*, damage to the person, as where a man is put in danger of his life, limb, or liberty ; and *third*, damage to his property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused."

In a claim for malicious prosecution, the plaintiff can thus claim compensation for : (1) damage to reputation, (2) damage to person, and (3) damage to property. But it is not necessary for the plaintiff to prove damage—

(i) where he has been prosecuted for a criminal offence, and

(ii) where the offence charged is from its very nature calculated to cause injury to the plaintiff, *e.g.*, bankruptcy proceedings against a trader or liquidation proceedings aginst a company with malicious intention of ruining them. In other cases it is necessary to prove damage.

Distinction between false imprisonment and malicious prosecution

(1) In false imprisonment the personal liberty of the plaintiff is wrongfully restrained ; in malicious prosecution the criminal law is wrongfully set in motion against him.

(2) Imprisonment is *prima facie* a tort ; prosecution is not so in itself. In an action for false imprisonment, the onus lies on the defendant to prove

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affirmatively and justify that the imprisonment was lawful. In an action for malicious prosecution the plaintiff has to allege and prove affirmatively the non-existence of reasonable and probable cause.

(3) In an action for false imprisonment, it is not necessary for the plaintiff to prove that the defendant was actuated by malice. In an action for malicious prosecution, the plaintiff has to prove malice on the part of the defendant, *i.e.*, he was actuated by an indirect and improper motive and not to further the end of justice.

Nervous shock

At one time no action could be taken for any mental suffering or emotional disturbance caused by the negligence of the defendant even if it was wilful unless it resulted in some manifest physical or bodily injury to the plaintiff. A bodily injury may not necessarily be mainfested by external visible injury. For example, injury through agitation caused by a false alarm or unlawful threats may result in a nervous breakdown or a mental shock which may incapacitate the plaintiff for his ordinary activities. And not to compensate him for this injury resulting from mental shock would be obviously unjust.

The body is controlled by its nervous system and if by reason of an acute shock to the nervous system the activities of the body are impaired and incapaciated from functioning normally, there is clear bodily injury. The injury may not necessarily result from the use of physical force ; it may result from the nervous shock caused by words and statements of the defendant. But causing of nervous shock is not enough ; some injury or illness must follow as a result of it to make it an actionable tort. In *Bourhill* v. *Young*, (1943) A.C. 92, Lord Macmillan observed in this regard. :

> "The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact."

Note the following cases:

Hambrook v. *Stokes Bros.*, (1925) 1 K.B. 141. *A* negligently left a motor lorry with its engine running at the top of a steep road. The lorry started sliding down. *B* who had left her child at the street corner saw the lorry coming down and became apprehensive that it might run into her child. She suffered a nervous shock. *Held*, she could recover damages.

Wilkinson v. *Downtown*, (1897) L.R. 2Q.B. 57. The defendant by way of practical joke informed the plaintiff that her husband had his leg broken in an accident. The plaintiff got a nervous shock and became seriously ill. *Held*, the defendants were liable.

Dulieu v. *White*, (1901) 2 K.B. 699. The defendants' servants negligently drove a horse van into a public house. The plaintiff, a pregnant women, who was standing behind the bar, suffered nervous shock which resulted in illness and premature birth of a still born child. *Held*, the defendants were liable.

Janvier v. *Sweeney*, (1919) 2 K.B. 316 (C.A.). The defendants' private detective asked the plaintiff to procure certain letters (which were within her access) of her mistress for their inspection under a false threat. The threat was that unless she did so they would inform the authorities that her finance was a German spy. As a

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result, she suffered from a mental shock resulting in her physical illness. *Held*, the defendants were liable.

Boardman v. *Sunderson*, (1964)1 W.L.R. 1317. The defendant, while backing his car, ran over the foot of the plaintiff's son who was seriously injured. On hearing his son's screams, the plaintiff who was within ear-short distance rushed to release his son. *Held*, in an action of negligence against the defendant the plaintiff was entitled to recover damages on account of the nervous shock he suffered.

Defamation

A man's reputation or the esteem in which he is held by the fellow-members of society is his property, and possibly more valuable than his other property [*Dixon* v. *Holden*, (1861) 7 Eq. 488]. If any one attacks or injuries his reputation, or makes a false statement about him to his discredit, this constitutes wrong of defamation. In the words of Park, B., defamation is "a publication, without justification or a lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt or ridicule." Publication means making the defamatory matter known in writing or orally or in any other form to some person other than the plaintiff.

In Halsbury's Laws of England, defamation has been defined as follows : "A statement which being published of another in the way of his lawful trade, business, profession, calling or office, conveys a reflection on him calculated to disparage or injure him therein, is a defamatory statement, even though it be not calculated to hold him to hatred, contempt or ridicule."

Winfield defines 'defamation' as the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person. The concluding words of this definition are obviously important. Thus to say of a woman that she is unchaste or of a man that he is immoral, hypocrite or a habitual drunkard or a black sheep or he has committed adultery is defamatory.

Youssoupoff v. *M.G.M. Pictures Ltd.*, (1934) 50 T.L.R. 581. In a talking cinematograph film produced by a film company, Czarina, a Russian princess, was shown as a victim of the lust of the notorious monk Rasputin. The princess was awarded damages to the tune of £25,000 since in the then existing conditions of society the behaviour of the notorious monk tended "to make the plaintiff to be shunned and avoided and that without any moral discredit on her part," and this amounted to defamation.

In the words of Scrutton L.J., defamatory words must be "words tending to expose the plaintiff to hatred, ridicule, and contempt in the mind of a reasonable man. I do not myself think this ancient formula is sufficient in all cases, for words may damage the reputation of a man as a businessman, which no one would connect with hatred, ridicule, or contempt." [*Tournier* v. *Provincial & Union Bank of England*, (1924) 1 K.B.461].

The law relating to defamation in India is contained in Chapter 21 of the Indian Penal Code, 1860.

Libel and slander. The wrong of defamation is of two kinds, namely,

(1) Libel, and

(2) Slander.

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A *libel* is a defamatory statement made in some permanent and visible form, *e.g.*, writing, picture, printing, caricature, effigy, statue or cinematograph film.

A *slander* is a defamatory statement made by spoken words or in some transient form, whether visible or audible, such as a gesture, a nod, a wink or a hissing.

Libel is defamation addressed to the eye and slander is defamation addressed to the ear. Whereas the former is *permanent*, the latter is *transient*. When a letter is dictated to a typist the dictation is slander. When the letter is forwarded, the forwarding amounts to libel.

Modern scientific inventions have in some cases made it difficult to say whether a certain defamatory statement is libel or slander. For example, the defamatory matter recorded on a gramphone disc, though addressed to the ear and not to the eye, is a libel because the defamatory statement is in permanent form. Likewise, a talking cinematographic film has been held to be a libel. The photographic part, of course, is a libel, but the speech which synchronises with it is also libel. In *Yourssoupoff* v. *M.G.M. Pictures Ltd.*, (1934) 50 T.L.R. 581, Slesser, L.J. observed in this regard as follows :

> "There can be no doubt that, so far as the photographic part of the exihibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen."

The distinction between libel and slander is observed under the English Law for the reason that whereas *libel is both a crime and a tort, slander is* only *a tort, i.e.*, a civil wrong. But under the Indian Law, both libel and slander are criminal offences under Sec. 499 of the Indian Penal Code, 1860. Further, under the English Law, libel is actionable *per se*, *i.e.*, without proof of special damage, whereas slander (except in certain cases) is actionable only on proof of special damage. The exceptional cases in which slander is actionable *per se* as follows :

(1) Imputation of criminal offence to the plaintiff.

(2) Imputation of a contagious disease to the plaintiff which has the effect of preventing others from associating with the plaintiff, *e.g.*, veneral disease.

(3) Imputation that a person is incompetent, dishonest or unfit in regard to the office, profession, calling, trade or business held or carried on by him.

(4) Imputation of unchastity or adultery to any woman or girl.

Essentials of defamation. In order to succeed in an action for defamation, the plaintiff must prove the following essential requisites :

(1) *There must be malice.* This means that the defamatory statement must be published maliciously, *i.e.*, with an evil motive or without just cause or excuse. Sometimes even an honest mistake or mere carelessness may amount to malice.

Morrison v. *Ritchie & Co.*, (1902) 4 F. 645. A newspaper published by an honest mistake that the plaintiff who was married only a month ago gave birth to twins.

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Held, the proprietor of the newspaper was liable, as the liability for libel does not depend on the intention of the defamer but on the fact of defamation.

(2) *The statement must be defamatory.* A defamatory statement is one which tends to lower a person in the estimation of right-thinking members of society generally, or which tends to make them shun or avoid that person.

The words must be constructed in the sense in which they would be understood by right-thinking members of the society, *i.e.*, men of fair average intelligence. A hasty expression or vulgar abuse or vituperative language used in anger does not amount to defamation if it only hurts the plaintiff's pride but does not disparage his reputation. If, however, it is likely to result in ridicule and humiliation of the plaintiff, an action would lie.

Ramdhara v. *Phulwatibai*, (1970) Cr. L.J. 286 (M.P.). The defendant inputed that the plaintiff, a widow of 45 years, was a keep of maternal uncle of the plaintiff's daughter-in-law. *Held*, the imputation upon the defendant's chastity constituted defamation.

In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads :

(i) the consequences of the attitude adopted to him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement ; and

(ii) the grief or annoyance caused by the defamatory statement to the plaintiff himself [per Lord Justice Diplock in *McCarey* v. *Associated Newspapers Ltd.*, (1964) 3 All E.R. 947].

(3) *The statement must refer to be plaintiff.* In order to succeed in an action for defamation, the plaintiff must prove that the defamatory statement refers to him. It is immaterial that the defendant did not intend to defame the plaintiff. It is sufficient if reasonable persons who know the plaintiff could reasonably infer that the defamatory statement referred to the plaintiff ; and if that is so, the defendant is liable.

Newstead v. *London Express Newspapers Ltd.*, (1940) 1K.B. 377. A newspaper published a report of the trial and conviction of bigamy of a batsman, named, 'Harold Newstead, a thirty-year old Campbel man'. There was also another man of the same name, aged thirty, and living in Campbell. The latter used the newspaper. *Held*, he could recover damages.

Hulton & Co. v. *Jones*, (1910) A.C. 20. A newspaper published a fictional article describing the activities of a fictitious character, Artemus Jones, stated to be a church-warden. The article cast some aspersions on Jones stating that he was leading a double life—that of a respectable man in England but that of rake in France where he could be seen at gay parties "with a woman, who is not his wife, who must be, you know the other thing." A London barrister of the same name brought a suit for damages against the newspaper on the ground that his friends who read the article understood that it referred to him and that he was defamed. *Held*, the newspaper was liable even though it did not know of his existence and, therefore, could not have intended to refer to him.

In India, however, it has been held that the decision in *Hulton & Co.* v. *Jones* wherein the innocent publisher of a defamatory statement was held liable, is against 'justice, equity and good conscience' and does not apply and

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there is no liability for the publication of innocent statements [*T.V. Ramasubba Iyer* v. *Ahmad Mohidien*, A.I.R. (1972) Mad. 369].

It should be noted that a *group of individuals* or *a class of* persons cannot as such be defamed. Thus, to say that "All lawyers are thieves" or "All priests are immoral and dishonest" or "Politicians are a pack of liars" is not defamatory, and unless a lawyer or a priest proved that the statement referred to him, he could not sue for defamation.

Knupffer v. *London Express Newspaper Ltd.*, (1944) 1 All E.R. 495. A statement was published which referred to a party, which had a membership of about two thousand. The respondants published a statement of the party as a whole. Some of the appellant's friends considered the article referring to them. *Held*, the respondents were not liable.

(4) *The statement must be published.* Publication consists in making the defamatory matter known in writing or orally or in any other form to some person other than the plaintiff. Publication to the plaintiff alone is not enough as in such a case his reputation or estimation in which others hold him is not affected in any manner.

Examples. There is a publication in the following cases and *A* is liable in all the cases :

(a) A tells *B* in the presence of *C* that *B* is a rogue.

(b) A sends to *B* a telegram or a post card containing some defamatory statements. This amounts to publication because a telegram is read by the post office staff for transmission of the message and as regards a post card the presumption is that it is likely to be read by post office staff.

(c) A writes a defamatory letter about *B* who is blind, and posts it to him in a sealed cover. He knows that the letter will be read to *B* by his wife or daughter. *B* receives the letter and his wife reads it to him.

(d) A sent a defamatory letter written in Urdu to *B* knowing fully well that B did not know Urdu script and that it would necessitate reading of letter by a third person [*A. Mudaliar* v. *A. Mudaliar* (1966) M.L.J. 233].

(e) A wrote a letter to *B* falsely alleging that *B* was a prostitute and brothel-keeper. There was every probability that *B*'s husband would read the letter which he in fact did [*Theaker* v. *Richardson*, (1962) 1 All E.R. 229].

The repetition of a defamatory matter orally or in writing is a fresh publication giving rise to a fresh cause of action. It is no defence in case of repetition to plead that the person who repeats the statement did not originate it.

Innuendo. There are two kinds of a defamatory statement, *i.e.*,

(a) a statement which is *prima facie* defamatory and,

(b) a statement which is not defamatory on the face of it but contains a latent meaning or implication which would lower the plaintiff's reputation in the eyes of those who know the facts. This hidden meaning is called *innuendo* which is, in other words, a veiled reflection on the character or reputation of the plaintiff. Sometimes even plain words or a simple statement may be an innuendo because of peculiar surrounding circumstances or facts or because of special meaning attributed to them.

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Examples. (a) A statement that "*A* is a saint" might be defamatory and is an innuendo it it was intended to refer to a criminal gang.

(b) A statement that *A* is an honest man and that he never stole my purse will be defamatory if the persons to whom it is made know that *A* had stolen my purse.

(c) A newspaper publishes a wrong statement that *D*, the daughter of *A* gave birth to a child. *D* is the only daughter of *A* and is unmarried. The statement carries an innuendo that *D* has been leading an immoral life.

A hidden meaning or implication may in certain circumstances be more telling and harmful in its effect than an obvious statement. In such cases the plaintiff who alleges that he has been defamed by innuendo must prove it [*Morrison* v. *Ritche & Co.*, (1902) 4 F. 654].

Cassidy v. *Daily Mirror Newspaper Ltd.*, (1929) 2K.B.331. A newspaper published a photograph of Mr. Corrigan and Miss X with the following words underneath : "Mr. M. Corrigan, the race horse owner, and Miss X whose engagement has been announced." Mr. Corrigan was already married to Mrs. Corrigan. Mrs. Corrigan sued the newspaper properties alleging that the statement imputed 'by innuendo' that she was immorally cohabiting with Mr. Corrigan and that several friends of Mrs. Corrigan thought that to be the case. *Held*, Mrs. Corrigan was entitled to damages although the defendants had made the statement innocently.

Tolley v. *J.S. Fry & Sons Ltd.*, (1931) A.C.333. A chocolate manufacturer published without the consent of one Mr. Tolley, a famous amateur golf champion, an advertisement which showed Mr. Tolley with a packet of their chocolates in his pocket. Mr. Tolley alleged an innuendo that a reasonable man would infer that he had prostituted his amateur golf status. *Held*, the advertisement was defamatory and the plaintiff was entitled to damages.

Monson v. *Tussauds Ltd.*, (1804) 1 Q.B.67. The effigy of *A* was placed alongside the effigies of well-known murderers. Even though *A*'s name was not written underneath his effigy, this amounted to defamation by innuendo.

Defences to defamation. The following defences may be raised in an action against defamation :

(1) *Justification.* If the alleged defamatory statement is substantially true, even though some details may be untrue, the defendant has a complete defence. It is not enough that he honestly believes the statement to be true ; he must strictly prove it and if he proves it, he is not liable even if he made the statement maliciously.

Wakley v. *Cooke & Healey*, (1849) 19 L.J.Ex.91. The defendant called the plaintiff a 'libellous journalist'. In a defence of justification, he proved that the plaintiff had once libelled against a person. Held, the defence was bad as the statement meant that the journalist habitually libelled people.

For the plea of justification it is enough if the defamatory statement is substantially true but incorrect in respect of some minor details or particulars.

Alexander v. *North Eastern Rail. Co.*, (1865) 6 B. & C.340. For travelling in a train without appropriate ticket, the plaintiff who had been sentenced to fine of £1 or 14 days' imprisonment in the alternative, was reported to have been sentenced to a fine of £1 or 3 weeks' punishment. *Held*, the defendants were not liable as the statement was substantially true.

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In practice, however, plea of justification is rarely raised. This is because if this defence fails, the defendant will be liable to pay substantial damages by reason of his having persisted in bad behaviour (which is assertion of the truth of defamatory statement).

(2) *Fair comment.* If an alleged defamatory statement is a fair comment honestly made upon a matter of public interest, it is a good defence. Public interest is a wide term ; and it is for the judge to decide in each individual case as to what constitutes 'a matter of public interest'.

The following subjects fall within the category of public interest: Central, State and local Governments, the conduct and speeches of persons in public offices and affairs generally, trade unions, the works of art, books, plays, televisions and other broadcasts. Every man who publishes a book commits himself to the judgment of the public and anyone may comment upon his performance [Lord Ellenborough in *Carr* v. *Hood*, (1808) 1 Camp. 385].

In order to succeed in the defence of fair comment, the following conditions must be fulfilled :

(a) The comment must be a statement of opinion and not an assertion of fact. A comment must be distinguished from a statement of fact. For example, if *A* says of a book published by *B* that "*B's* book is foolish" and that "*B* must be a weak man", these comments are an *opinion* and will be protected if they are made in public interest. But if *A* says "I am not surprised that *B's* book is foolish and indecent for he is a weak man and libertine," this is a statement of fact and *A* cannot plead defence of fair comment.

(b) *The comment must be fair, i.e.*, something reasonably warranted by the matter commented upon. Criticism cannot be used as a cloak for mere invective. To be fair, the comment must always be based on facts.

> *Odger* v. *Mortimer*, (1873) 28 L.T. 472. The plaintiff organised a public agitation against a bill introduced in Parliament. The defendant's newspaper described him as "half booby, and half humbug, a demagogue of the lowest type, a political cheap Jack who would be a political sharper if he had brains enough." *Held*, the defendant was not liable as the publication was a fair comment.

(c) The comment must not be malicious, i.e., it must not be prompted by spite, ill-will or evil motive for malice may destroy the defence of fair comment. It must also not reflect upon the moral character of the person criticised.

(d) The matter commented upon must be of public interest.

(3) *Privilege.* There are certain occasions which the law, for some reason, regards as sacrosanct. The statements made on these occasions are privileged, and are not actionable on the grounds of public policy. The liability for a defamatory statement on such privileged occasions is excused because the interests of the public override the plaintiff's interest or right to his reputation.

Privilege may be either *(a)* an absolute privilege, or *(b)* a qualified privilege.

(a) Absolute privilege. In matters of absolute privilege, no action lies for a defamatory statement even if it is false and is made maliciously and out of improper motives. The occasions which are absolutely privileged are as follows :

(i) Parliamentary proceedings. Article 105 (2) of our Constiitution provides that no Member of Parliament shall be liable for any proceedings in respect

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of anything said by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, or proceedings.

Article 194 (2) makes a similar provision in respect of State Legislatures.

(ii) Judicial proceedings. No action for libel or slander lies, whether against judges, counsels, witneses, or parties, for words written or spoken in the course of any proceedings before any Court recognized by law, even though the words written or spoken were written or spoken maliciously, or without any justification or excuse, and from personal ill-will and anger against the person defamed [*Royal Acquarium, etc. Society Ltd.* v. *Parkinson*, (1892) 1 Q.B. 431]. This privilege also extends in proceedings of the tribunals exercising functions similiar to those of a Court of Law.

Examples. (a) A judge tells *A* in the Court that he is "a harpy, preying on the vitals of the poor." *A* sues the judge for slander alleging that the words complained of had been spoken "without any foundation whatever" and that they were wholly "uncalled for, immaterial, irrelevant, and impertinent". The judge is not liable, the statement having been made on an absolutely privileged occasion.

(b) B, while giving evidence in a dispute as to the genuineness of a signature to a will witnessed by A said : "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death." Asues *B* for defamation alleging that the meaning of the statement was that *A* had been guilty of forgery or of abetting it. The statement made by *B* is absolutely privileged and, therefore, no action lies against him.

(iii) Communications made by one officer of State to another in the course of his official duty.

(b) Qualified privilege. In the matter of qualified privilege when a statement is false and defamatory, it is not actionable *without* proof of malice. Qualified privilege affords protection only to mistaken statements honestly made without malice. It exists in respect of the following matters :

(i) Fair and accurate reports of parliamentary proceedings.

(ii) Fair and accurate reports of public judicial proceedings.

(iii) Fair and accurate reports of various matters of public interest and importance such as the proceedings of the U.N.O., International Court of Justice, and proceedings of public meetings of local authorities, public companies or any tribunal or body exercising functions under an Act of Parliament.

(iv) Statements in protection of one's private interest or property.

(v) Statements made to the authorities for redress of public grievances.

(vi) Statements made in pursuance of legal or moral duty, for example, information given by employer *A* to employer *B* about his servant's character.

II. TORTS TO PROPERTY

Trespass

There are three types of trespass, namely.

(1) Trespass to person *(i.e.,* battery, assault and false imprisonment). These have been discussed earlier in this Chapter.

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(2) Trespass to land, and

(3) Trespass to goods.

Trespass to land

Trespass to land means interference, without lawful justification, with the possession of another person's land. It may take three forms :

(1) entry on the land of another person ;

(2) remaining on that land ; and.

(3) placing or throwing any material object upon that land.

Examples. (a) Throwing stones upon another person's land.

(b) Putting a hand on a fence or through an open window of another person's house.

(c) Driving nails into the wall of another's house.

(d) Placing a ladder against the wall of another's house.

Salmond observes that throwing stones upon one's neighbour's premises is a wrong of trespass ; but allowing stones from a ruinous chimney to fall upon those premises is the wrong of nuisance.

Trespass is always actionable per se. It is not necessary to prove actual damage to the land. The trespasser is liable even when there is an honest mistake on his part, for mistake is no defence.

What is included in land ? 'Land' includes not only the soil itself but also the things under the soil and fixtures to the surface, *i.e.*, building and houses. Trespass is, therefore, possible not only on the surface of the land but also by an intrusion into the sub-soil, *e.g.*, laying of a cable or taking minerals from out of the sub-soil.

Trespass on land is a tort. Mere trespass on land is a tort and not a crime. As such no prosecution for trespass but a civil action can be brought, and no damage in such a case need be proved. If, however, the trespass is accompanied by some damage (as, for example, when fences are broken or crop in a field is treaded), an offence of wilful damage is committed and in such a case prosecution may be brought.

Trespass is a wrong against possession. In an action against trespass the plaintiff has to prove the following things :

(1) that he was in possession of immovable property ; and

(2) that his possession was disturbed by the defendant. He need not prove that he is the owner of the land or that his possession is lawful. The rule is that "any possession is a legal possession against the wrong-doer". This possession is good against all the world except the true owner.

Trespass *ab initio.* A person may sometimes enter on the land of another by authority of law (as distinct from the authority conferred by the plaintiff occupier). If he subsequently abuses his authority, *i.e.*, right of entry, by some positive act of wrong-doing, he becomes a trespasser *ab initio.* His abuse in such a case relates back to render his original entry unlawful as if the authority never existed. The doctrine of trespass *ab initio* is based on the rule

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that the subsequent abuse of authority shows that the wrong-doer had entered on the land with a wrongful purpose in mind. It should also be noted that the abuse of authority by the plaintiff must consist of a *misfeasnce* (*i.e.*, a positive act of wrong doing such as stealing) or *a non-feasance* (*i.e.*, an omission to do something such as failure to pay for food in an inn).

The doctrine of trespass *ab initio* may illustrated with the following ancient case :

> *The Six Carpenter's Case*, (1810) 8 C. Rep. 146. Six carpenters entered an inn and ordered a quart of wine and bread for which they paid. They then placed order for more wine and bread for which they refused to pay. *Held*, they were not trespassers *ab initio* because they had done no positive act of abuse of their authority to enter the inn and their offence of not paying was one of non-feasance and not misfeasance.

Remedies for trespass to land. The following remedies are available to the plaintiff for trespass to land :

(1) *Damages.* The plaintiff may bring an action against the trespasser for the recovery of damages by which the value of the property is diminished as a result of the trespass.

(2) *Injunction.* The plaintiff may apply to the Court for injunction to prevent the continuance or repetition of the act of tresspass.

(3) *Ejection.* The plaintiff may forcibly eject the trespasser after first requesting him to leave and allowing him peaceably to do so. He must not, however, use more force than is reasonably necessary under the circumstances.

(4) *Action for possession.* Sec. 6 of the Specific Relief Act, 1953 specifically provides in this regard as follows :

> "If any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in such a suit."

A suit under Sec. 6 cannot be brought after the expiry of 6 months from the date of dispossession.

(5) *Action for mesne profits.* The plaintiff may also bring an action for mesne profits, *i.e.*, compensation for the loss which he suffered during the period of dispossession of land.

(6) *Distress damage feasant.* When goods or cattle trespass on someone's land, he may lawfully seize them and retain them until he is compensated for the damage caused by tresspass.

Defences to trespass to land. The following defences or justifications may be put forward against an action for trespass to land :

(1) *Entry by authority of law, e.g., (i)* by police to make an arrest or to search premises or by a sheriff to execute some legal process ; *(ii)* by bailiffs to distrain for rent or to eject a tenent.

(2) *Entry by licence or permission of the occupier, express or implied.* Pollock defines licence as "that consent, which without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful."

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(3) *Entry to abate a nuisance, e.g.*, to cut off the overhanging branches of a neighbour's trees, or entry on the ground of necessity, *e.g.*, to put out a fire for public safety.

(4) *Entry for self-defence* or in defence of goods.

(5) *20 years' open user*, as for example, a right of way over the land.

Tresspass to goods

The wrong of trespass to goods consists in wrongful or unjustifiable interference with the possession of goods of another. It may result in taking the goods out of the plaintiff's possession or by causing damage to them.

Trespass to goods may take innumerable forms, such as throwing another's furniture out of window, throwing of stones at a car, removing the wheel of another's car or scratching the body of another's car, shifting a dustbin of another, shooting birds, or beating animals of another or infecting them with disease or killing an animal by giving it poisoned meat.

Trespass to goods is actionable *per se* (that is without the proof of any damage). Once trespass is proved, the plaintiff is entitled to damages ; if he does not suffer any loss he is entitled to nominal damages.

There are three essential requisites of trespass to goods :

(1) *Wrong against possession.* Trespass to goods is essentially a wrong against possession rather than ownership. To maintain action for trespass, the plaintiff must show that he had possession of the goods at the time of the trespass. A bailee or pledgee of goods, for example, may maintain action against any person who wrongfully interferes with the goods in his possession.

(2) *Physical interference.* There must be direct physical interference in the possession of the plaintiff which he has to prove. Even a slight interference or a mere touching may be trespass.

(3) *Without lawful justification.* The interference must be wrongful or without lawful justification. There is however justification, when—

(a) the defendant seizes the goods belonging to the plaintiff under the exercise of his right of distress damage feasant, or

(b) the damage to another's goods is caused in exercise of the right of private defence, or

(c) there is inevitable accident.

Detinue and conversion

Detinue. Detinue is the wrongful detention by the defendant of the goods belonging to the plaintiff. If the defendant refuses to deliver the goods on a lawful demand by the plaintiff, the plaintiff can recover the same by bringing an action for detinue.

Examples. (a) *A* sets out his bicycle to *B* for 2 hours. It's detinue if *B* does not return the bicycle after after the expiry of 2 hours.

(b) *A* gives his watch to *B*, a watch repairer, for repair. If *B* refuses to return the watch after a demand has been made for its return, it amounts to detinue.

The following points should be noted in connection with detinue :

(1) The action for detinue is based on *ownership.*

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(2) The plaintiff must have *made a demand* for the return of the goods.

(3) The defendant must have *refused to return* the goods.

(4) The plaintiff requires *restitution* of the specific goods and not merely damages.

Difference between trespass and detinue. In trespass the plaintiff is in possession and sues in respect of the injury. In detinue the goods are in the possession of the defendant and he refuses to deliver up the possession to the plaintiff after the demand. In India an action similar to detinue is possible under Secs. 7 and 8 of the Specific Relief Act, 1963.

Conversion. 'Conversion' is any act in relation to goods of a person which constitutes an unjustifiable denial of his title to them. In the words of Salmond, the tort of conversion consists in an "act of wilful interference, without lawful justification, with any chattel in a manner inconsistent with the right of another, whereby that other is deprived of the use and possession of it." Two elements are combined in such interference, *i.e.*,

(1) a dealing with a chattel in a manner inconsistent with the right of the person entitled to it, and

(2) an intention in so doing to deny that person's right or to assert a right which is in fact inconsistent with such right.

In *Lancashire & Yorkshire Rail. Co.* v. *MacNicoll*, (1919) 88 LJKB 601, Atkin J. defined 'conversion' as "a dealing in goods in a manner inconsistent with the right of true owner, provided that there is also an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right."

Wilful interference. For an action for conversion, there must be wilful and wrongful interference with the goods of the plaintiff. If the defendant negligently loses goods or destroys them he is not liable for conversion. For example, if a bailee loses goods negligently, he is liable in detinue but not in conversion. But if he delivers the goods to a wrong person, he may be sued in conversion. Note the following case in this regard :

> *Consolidated Co.* v. *Curtis* (1892) 1 Q.B.495. An auctioneer was handed over by his client some household goods to sell. The client was not the true owner of the goods. The auctioneer who sold the goods did not know the true position. *Held*, the auctioneer was liable in conversion.

Methods of conversion. There are three distinct methods by which one may be guilty of conversion, namely—

(1) By wrongfully taking goods, *e.g.*, where *A* steals *B*'s goods.

(2) By wrongfully detaining goods.

(3) By wrongfully disposing of goods, *e.g.*, delivering the goods to a person not entitled to them or by wilfully and unlawfully destroying them physically or altering their identity.

Note the following cases in this regard :

> *Hollins* v. *Fowler*, (1875) L.R.7 H.L. 757. The defendant, a cotton broker, acting on behalf of a customer for whom he had often made purchases, bought 13 bales of cotton from *B* who had obtained them from the plaintiff by fraud. The broker, who had absolutely no knowledge of the fraud, sold the cotton to the customer

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and received his commission. *Held*, the broker was liable to the plaintiff in conversion for the entire value of the cotton.

Armory v. *Delamirie*, (1722)1 Str. 505. *A* found a jewel lying in a street. He took it to *B*, a goldsmith, to know its price. The goldsmith refused to return it to *A*. *Held*, B was liable in conversion ; *A* had a good title of the jewel except as against the true owner.

Richardson v. *Atkinson*, (1723)1 Str. 576. The defendant took out some wine from the plaintiff's cask and replaced it with water to make up the loss. *Held*, the defendant was liable in conversion for the entire value of the cask as he had converted part of the contents by taking them away and the remaining part by destroying its identity.

Difference between trespass and conversion. The difference between trespass and conversion was fully brought out in the following case :

Fouldes v. *Willoughby*, (1841) 8M. & W. 540. *F* had put his horses on *W*'s ferry boat. A dispute arose between them and *W* refused to carry the horses. Further in order to induce *F* to leave the boat, *W* put the horses ashore. In spite of this *F* refused to leave the boat and was carried to the other side of the river. He brought an action against *W* for conversion. *Held*, *W* was liable for trespass to the horses and not for conversion. The wrongful act of removing the horses was a trespass and not conversion as the intention of *W* was to take possession of the horses or to deprive *F* of their possession. A simple removal or shifting of a thing from one place to another wrongfully is mere trespass to the goods and is not sufficient to establish a conversion.

Difference between detinue and conversion. The difference between detinue and conversion is that in detinue the tort amounts merely to a denial of possession to the plaintiff, whereas in conversion there must be some act involving denial of title (ownership) of the plaintiff.

Defence to an action for conversion. These include—

(1) Lien.

(2) An unpaid seller's right of stoppage in transit.

(3) Distress damage feasant.

(4) Distress, *e.g.*, by a landlord of his tenant's goods for arrears of rent.

(5) Abatement of nuisance, *e.g.*, cutting of overhanging branches of tree.

(6) Estoppel, *e.g.*, when the owner of some goods by his conduct misleads the defendant to part with the goods.

III. TORTS TO PERSON AND PROPERTY

Negligence

For the purpose of the law of torts, the term 'negligence' is used in two contexts :

(1) It may signify the state of mind of a person committing a tort, *e.g.*, where *A* commits a trespass intentionally, unintentionally, or negligently. It is the mental condition here which is responsible for the commission of the tort. The person doing the act does it with the knowledge of its consequences.

(2) It may mean an independent tort ; and it is with the independent tort of negligence that we shall be concerned here.

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Definition of negligence. In the words of Winfield, 'negligence' as a tort "is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff." But to this definition the following words must be added "Negligence is the absence of care according to the circumstances." [*Vaughan* v. *Taff Vale Rail. Co.*, (1860) 5 H. & N. 679].

In *Heaven* v. *Pender*, (1883) 11 Q.B.D. 503, Brett, M.R. defined 'negligence' in the following words :

> "Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property."

Elements of negligence. In an action for negligence, the plaintiff must prove the following three points :

(1) That there was existence of a *legal duty to take care owed by the defendant* to the plaintiff.

(2) That there had been a *breach of that duty* by the failure of the defendant to take such care as a reasonable man would have taken.

(3) That as a result of the breach of duty referred to above the *plaintiff has suffered damage.*

(1) *Duty of care to the plaintiff.* The most important requisite in establishing negligence is to show that the defendant was under a duty of care to the plaintiff, and this duty has not been performed. 'Duty' means a legal duty, as distinguished from a moral obligation, that a person shall behave in a manner as a reasonable person would behave in like circumstances. A person, for example, does not owe duty of care to the poor (*e.g.*, to feed a starving person), but he does owe a duty of care to pedestrians and other road users while driving his motor car. Likewise, a doctor owes a duty of care to his patients, an employer to his employees, a carrier to his passengers and a teacher to his pupils.

If a person owes no duty to any one, he may be as negligent as he pleases towards the whole world. In his own field or estate, a person can drive his tractor or car in any manner he pleases. But the moment he brings his tractor or car on road, he owes a duty of care to the general public. If he injures people through careless driving, he is guilty of negligence and can be sued.

The next question is : *What is the test to determine the existence or non-existence of a duty of care or when does a duty of care arise ?* The test was laid down in the leading case of *Donoghue* v. *Stevenson*, (1932) A.C. 562.

> *Donoghue* v. *Stevenson.* A man bought from a retailer a bottle of ginger-beer manufactured by the defendant. He gave the bottle to his lady friend who drank the contents. The bottle was opaque and the friend discovered to her horror, while filling her glass, that there was a dead snail in the bottle. She received a shock and fell ill. *Held*, she could recover damages from the manufacturer for negligence. The House of Lords observed that the manufacturer ought to have foreseen the likelihood that a person in the position of the plaintiff would consume his wares and that he, therefore, owed her a duty of care to ensure that the bottle should not contain the objectionable matter it did ; hence, if this duty had in fact been broken the manufacturer would be liable.

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Accordingly the duty is towards persons who are in contemplation of the wrong-doer and closely and directly affected by the negligent act.

Bourhill v. *Young*, (1943) A.C. 92. A collision occured between a motor cycle and a motor car on account of the negligence of the driver of the motor car. *X* saw the collision from a distance and suffered a nervous shock. *Held*, *X* could not recover damages from the car owner.

Standard of care. The standard of care is the standard of an ordinary prudent man in the particular situation. As regards degree of care a man is required to use in a paricular situation in order to avoid the imputation of negligence, it may vary in different situations and with the obviousness of the risk. For example, a person handling a loaded gun is expected to take greater care than a person handling a walking stick. The greater the danger, the more cautious one has to be. That is why a manufacturer or a dealer in explosives, poisons and drugs has to manifest a high degree of care.

In an important case *Dr. Narsimha Rao* v. *Gundavarpa Jayaprakasu*, A.I.R. (1990) A.P. 207, the Court laid down that persons who undertake work which requires special skill have to measure upto the standard of proficiency that can be expected of such profession. Failure to conform to required standard of care can result in material injury. There is a proximate connection between conduct of person undertaking a job and the injury. In cases of surgeons and anaesthetists a higher degree of skill is required. In this case a compensation of Rs. 50,000 was awarded.

Where a person is expert in some business, *e.g.*, an income-tax practioner, or possesses a particular skill, *e.g.*, a surgeon, the law will hold him guilty of negligence if he fails to show expert skill. A coolie or a labourer may not display the same amount of skill as a surgeon. The test to be applied is : What is reasonable in the circumstances of the case, having regard to a person's particular profession or occupation ? The following cases illustrate this point :

King v. *Philips*,(1953) 1 Q.B. 429. The defendant, a taxi-driver, carelessly backed his taxi into a small boy on a tricycle. His mother heard his screams from the window of a nearby house and saw the the tricycle under the taxi. She suffered nervous shock. *Held*, although the defendant was negligent *vis-a-vis* the boy, he owed no duty to the mother of the boy and was therefore not liable to her.

Yachuk v. *Oliver Blais Co. Ltd.*, (1949) A.C.386. A garage attendant let a boy of nine a tin of petrol on the false pretext by the boy that her mother had run short of petrol. The boy set some timber on fire with the help of petrol. The fire caused an explosion and the boy was injured. *Held*, the garage attendant was liable for negligence.

Camarthenshire C.C. v. *Lewis*, (1955) A.C. 549. A child aged 4 walked out of school premises when the mistress was attending to another child who had hurt himself. A lorry driver was killed while trying to save the boy when his lorry struck against a telegraph pole. *Held*, the school mistress had not been negligent, but the County Council (controlling the School) were liable in negligence.

(2) *Breach of duty.* In order to succeed in an action for negligence, the plaintiff must show not only that a duty was owed to him by the defendant, but also that there was breach of that duty by the defendant. Breach of duty means non-observance by the defendant of due care which is required in a particular situation. The standard of care required is the standard of

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a reasonable or prudent man placed in the circumstance of the defendant. If the defendant has acted like a reasonable prudent man, there is no negligence. For example, the driver of a motor car will not have broken his duty if it is clear that the could not, as an ordinary prudent driver, avoid the accident.

(3) *Damage.* The plaintiff must also prove that as a result of the breach of duty owed by the defendant to him, he suffered some damage. He must also show that the damage thus caused is not too remote a consequence of the defendant's negligence and that it could also be reasonably foreseen by the defendant. Two tests have been laid down in this regard :

(a) Test of directness of damage. A defendant is liable for the damage which is the direct consequence of his act whether such damage could be foreseen or not by a reasonable man. The following case illustrates the point :

> *Polemis & Furness, Withy & Co., Re* (1921) 3 K.B.560. The defendants chartered a ship carrying drums of petrol. Due to leakage in the drums, some petrol collected in the hold of the ship. A worker negligently dropped a plank into the hold which caused a spark. This resulted in a fire in the ship which completely destroyed the ship. *Held*, the loss of the ship was a direct consequence of the negligent act and as such the charterers of the ship were liable for the loss of the ship.

(b) Test of reasonable foresight or foreseeability test. According to this test, the defendant is liable only if the consequences of a wrongful act could have been foreseen by a reasonable man. Thus foreseeability is the test for liability of the defendant for the damage.

> *The Wagon Mound Case,* (1961) A.C. 388. The Wagon Mound, an oil ship, was chartered by the appellants. Owing to negligence of appellant's servants, fuel oil split from the ship into Sydney harbour. The oil was spread over and carried by the tide to the respondent's wharf where their employees were welding. The sparks from welding ignited the oil and set fire to the wharf and damaged the ship which the respondents were refitting. *Held*, the appellants were not liable as they could not have reasonably foreseen that the floating oil would catch fire ; and as such they were not liable even though the damage caused was the direct result of their servants' negligence.

Res ipsa loquitur—*the thing speaks for itself.* As a general rule, the onus of proof of negligence lies on the plaintiff, *i.e.*, the plaintiff must prove that the defendant has, by his act or omission, been negligent in the discharge of a legal duty owed to the plaintiff. There are, however, certain cases when the plaintiff is not required to prove negligence ; the negligence in such cases is presumed as "the thing speaks for itself". This happens where the circumstances surrounding the thing which cause the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part [Ramaswami J. in *Municipal Corpn. of Delhi* v. *Subhagwati* A.I.R. (1966) S.C. 1750].

Simply stated, the principle underlying *res ipsa loquitur* is this : When an accident speaks for itself (*i.e.*, the given facts are strongly in favour of negligence on the part of the defendant), the plaintiff has simply to show that the accident has occured ; the law itself draws inference of negligence on the part of the defendant. If the defendant can produce a reasonable explanation

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(e.g., his negligence was not in fact the cause of accident), it is then for the plaintiff to prove negligence. Note the following cases in this regard :

Byrne v. *Boadle*, (1863) 2 H.&C.722. The plaintiff was walking along a street when a barrel of flour fell upon him from an open door on an upper floor of the defendant's warehouse. *Held* , the facts were sufficient evidence of negligence and the case could go to the jury without evidence being adduced as to how the accident had occured. Barrels which are properly handled do not generally so fall, and jury might reasonably infer negligence on the part of the defendant.

Scott v. *London & St. Katherine Docks Co.*, (1865) 3 H. & C. 596. The plaintiff, a customs officer, whilst lawfully passing near the door of the defendant's warehouse in the docks, was injured by some bags of sugar falling on him. *Held*, the defendants were liable.

Kearney v. *London & Brighton & South Coast Rail.*, (1870) L.R. 5 Q.B. 411. A brick fell from the arch of a railway bridge belonging to the defendant railway company and hit the plaintiff passing along the street below. *Held*, the railway company was liable on the ground of *res ipsa loquitur*.

McGowan v. *Scott*, (1930) 143 L.T. 217. The defendants' motor car mounted the pavement and knocked down the plaintiff, a pedestrain, from behind. *Held*, the defendant was liable and the rule in *res ipsa loquitur* would apply.

State of Punjab v. *Modern Cultivators*, A.I.R. (1965) S.C.17. The lands of the plaintiff were flooded as a result of breach a in a canal belonging to the Government. The plaintiffs brought a suit to recover the loss suffered by flooding. *Held*, the Government were liable in damages.

Muncipal Corpn. of Delhi v. *Subhagwati*, A.I.R. (1966) S.C.1750. Three persons died as a result of the collapse of the clock tower situated opposite the Town Hall in the main bazar of Chandni Chowk, Delhi. The clock tower belonged to the appellant Corporation (formerly the Muncipal Committee of Delhi), and was exclusively under the ownership and control of the appellant or its servants. It was found that the clock tower was 80 years old but the normal life of the structure of the top storey of the tower, having regard to the kind of mortar used, could be 40 to 50 years. In these circumstances, the fall of the clock tower told its own story in raising an inference of negligence so as to establish a *prima facie* case against appellants. *Held*, the appellants were liable since they could not prove absence of negligence on their part.

Mangi Lal v. *Parasram*, A.I.R. (1971) M.P.5 (F.B.). A boy sitting by the side of a road was run over by a bus coming on the wrong side of the road. *Held*, the defendant was liable on the principle of *res ipsa loquitur*.

Mata Prasad v. *Union of India*, A.I.R. (1978) All. 303. The plaintiff, a carrier, was crossing a railway level crossing at 6.15p.m. when the gates were open. He was hit by a railway engine which had no head-lights and which gave no whistle. *Held*, the Railway Administration was liable on the maxim of *res ipsa loquitur*. The fact that the gate was open is *prima facie* evidence of negligence on the part of the Railway Administration.

Kerala State Electricity Board v. *Kamalakashy Amma*, A.I.R. (1987) Ker.253. In this case, the plaintiffs succeeded in proving that a pedestran was electrocuted from a live wire hanging down from an electric post. *Held*, there was a presumption of fact that there was lack of proper care on the part of those in the management or control of the power supply system at the particular place and it was for the

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reasonable' compensation which was due was awarded. This is in a way recognition of the principle embodied in the maxim *res ipsa loquitur*.

Chairman-cum-Managing Director, BSRT Corporation v. *Manju Bhushan Sinha*, A.I.R. (1992) M.P. 244. A State Transport bus coming from behind dashed against a cycle rickshaw which is a slow moving vehicle. The passenger was thrown out of the rickshaw due to the impact of the accident. *Held*, the bus driver was driving rashly and negligently and the principle of *res ipsa loquitur* applies.

The principle of *res ipsa loquitur* which was often found to be a helping guide in the evaluation of evidence in English decisions has been recognised in India also [*Syed Akbar* v. *State of Karnataka*, A.I.R. (1979) S.C. 1848].

Failure to perform emergency operation and death of a patient on account of such failure amounts to negligence on the part of a surgeon. When the surgeon advances a plea that the patient did not give his consent for the surgery or the course of treatment advised by him, the burden is on him to prove that the non-performace of the surgery or the non-administration of the treatment was on account of the refusal of the patient to give consent thereto. This is especially so in a case where the patient is not alive to give evidence [*T.T. Thomas* v. *Elisa*, A.I.R. (1987) Ker. 52].

Defences to negligence. The following defences are available to the defendant in an action on negligence:

(1) Denial by the defendant that he owed any duty to the plaintiff.

(2) Denial by the defendant of failure to take reasonable care.

(3) *Volenti non fit injuria, i.e.*, voluntary assumption of risk by the plaintiff (discussed under the heading 'General defences to tort').

(4) *Plea of contributory negligence.* When a plaintiff by his own negligence contributes to the damage caused to him, he is guilty of contributory negligence. At Common Law (till 1945) it was a complete defence to an action on negligence for a defendant to show that the plaintiff's own negligence (*i.e.*, lack of due care on his part) had contributed to cause the damage. And this negligence stood in his way to recover damages of which he complained from the negligent defendant. The following case illustrates the point :

Butterfield v. *Forrester*, (1809) East. 60. The defendant wrongfully put a pole across a highway. The plaintiff who was riding violently at dusk, did not notice the obstruction and ran into it and was injured. *Held*, he could not recover damages as he failed to take due care to avoid the accident.

The Common Law rule of contributory negligence has now been modified in England by the Law Reform (Contributory Negligence) Act, 1945. Sec. 1(1) of this Act provides thus : "When any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

Example. A, a motor-cyclist, was driving his motor-cycle negligently. He dashed against a bus whose driver was also found to be negligent. He claimed damages for injuries sustained. The Court found that *A* was one-third to blame. It, therefore, awarded damages to the extent of two-thirds of what the compensation

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would have been if he was not negligent (*i.e.*, compensation due *less* one-third for his negligence).

In India, although there is no legislation corresponding to the Law Reform (Contributory Negligence) Act, 1945 of England, the Courts here have been following the rule as laid down in Sec. 1 (1) of the English Act [*Vidya Devi* v. M.P. *State Road Transport Corpn.*, (1974) M.P.L.J. 573 ; *Shubhakar* v. *Mysore State Road Transport Corpn.*, A.I.R. (1975) Ker.73].

Mahabir Prasad Bubna v. *United Bank of India*, A.I.R. (1992) Cal. There was negligence by a customer of a bank. The Court apportioned the liability and held that 50 per cent of the loss was to be reduced as there was contributory negligence on the part of the bank.

Liability for dangerous premises. The nature of the obligation of an occupier of land or premises or of fixed or movable structures may be discussed under the following three heads :

(1) Obligation towards lawful visitors.

(2) Obligation towards trespassers.

(3) Obligation towards children.

(1) **Obligation towards lawful visitors.** Lawful visitors may include-

(a) Persons entering under contract. Where a person (the plaintiff) enters the land or structure of another (the defendant) in pursuance of a contract, the liability of the injuries sustained by the plaintiff depends upon the terms of the contract. The defendant owes the highest duty of care to the plaintiff who pays for permission to enter the defendant's premises for some agreed purpose.

Maclean v. *Segar*, (1917) 2 K.B.325. The plaintiff was a guest in the defendant's hotel. A fire broke out in the hotel due to a defect in the kitchen chimney. The plaintiff could not get out as there was no fire escape. She, however, tried to escape by tying the bed sheets and using it as a rope. In the process she was injured. *Held*, the defendant was liable.

Francis v. *Cockerell*, (1817) L.R.5 Q.B. 501. The plaintiff bought a ticket of 5s. for a seat on the grandstand for spectators to view a horse race arranged by the defendant. He was injured by the falling of the stand which had been negligently constructed by a firm of contractors. *Held*, the defendant was liable.

There are two exceptions to the rule in *Francis* v. *Cockerell*, namely :

(i) The terms of contract may expressly exclude or restrict the liability of the occupier.

(ii) In case of sale or lease of dangerous premises, the seller or lessor is not liable, unless he has acted fraudulently.

(b) Invitee. An invitee is a person who comes on the occupier's premises with his consent, on some business in which both the occupier and the visitor are interested or have a common interest [*Pearson* v. *Lambeth B.C.*, (1950) 2 K.B. 353]. The occupier of premises must take reasonable care to prevent injury to the invitee from unusual danger of which he knows or ought to know. This duty of the occupier was laid down in the following well-known case :

Indermaur v. *Dames*, (1866) L.R. 1 C.P. 274. The plaintiff, a gas-fitter, entered the defendant's premises to test some gas-fittings there. While doing so he fell

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through an unfenced shaft and was injured. *Held*, the defendant was liable for the injury caused to the plaintiff because he was an invitee on the defendant's premises.

An invitee, however, takes the risk of obvious dangers [*Hall* v. *Brooklands Auto Racing Club*, (1933) 1 K.B.205].

(c) Licensee. A licensee is a person who enters the premises of another either with his consent, express or implied, or by virtue of a legal right to do so, but he has no common interest with the occupier of the premises. This means he enters the premises of the occupier for his own rather than for the occupier's interest or purpose. A guest at a house, travelling salesmen entering premises to solicit orders, persons visiting public parks or recreation grounds are licensees.

A licensee is said to enter premises at his own peril—he must take the premises as he finds them. The occupier, however, has a duty towards a licensee to give him due warning of any latent defect or concealed danger or trap in the premises of which the occupier is aware. He is not liable for the loss caused by—

(i) the dangers not known to him, or

(ii) the dangers which are obvious and which the licensee must himself appreciate. Note the following leading case on the point :

Fairman v. *Perpetual Investment Building Society*, (1927) A.C.74. The plaintiff was living with her sister who was a tenant of a flat in a building owned by the defendant. The defendant retained possession and control of the common staircase. The plaintiff's heel was caught in a hollow formed in one of the stairs caused by the wearing away of the cement. *Held*, the defendant was not liable as the danger was obvious.

In England the distinction between 'invitees' and 'licensees' has now been abolished by the Occupiers' Liability Act, 1957, which requires an occupier to observe towards invitees and licensees a *common duty* of care which means "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted to be there."

Secs. 57 and 58 of the Indian Easements Act, 1882, provide the following duties of a grantor of license towards the licensee in this regard :

(i) The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware (Sec. 57).

(ii) The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee (Sec. 58)

(2) **Obligation towards trespassers.** A trespasser is one who goes upon another person's land without invitation of any sort and whose presence is either unknown to the owner, or if known, is practically objected to. In other words, he has no leave or licence to enter another person's land or premises. The occupier has no duty to warn him about the defects or take any precaution for his safety.

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Great Central Rail. v. *Bates*, (1921) 3 K.B. 578. A policeman entered the defendant's warehouse at night suspecting that someone was commiting a theft there. He fell into a pit dug in the compound. *Held*, he was a trespasser and, therefore, could not recover damages.

Although the general rule is that an occupier is not liable in tort to a trespasser, there are two exceptions to this rule :

(a) The occupier must not deliberately cause harm to the trespasser.

(b) He must not act with reckless disregard of trespasser's safety if he has knowledge of his presence in his premises or land. The following case explains the point :

Mourton v. *Poulter*, (1930) 2 K.B. 183. The defendant, a nurseryman, was felling a tree. Some trespassing children were watching. The tree fell on one of the children who were not warned. *Held*, the defendent was liable even though the plaintiff was a trespasser, because the defendant had failed to give warning of the imminent danger to the plaintiff.

(3) **Obligation towards children.** Children are generally less careful than adults. They are too young to appreciate sometimes even the obvious danger. They may be lured by some attractive but dangerous object which may be a trap. The occupier must take reasonable care to guard them against such dangers from which the adults do not need any protection.

Glasgow Corpn. v. *Taylor*, (1922) 1 A.C.44. A seven year old child was taken to a public garden which was under the control of a Corporation. The child picked up and ate a fruit looking like a berry from one of the shrubs. The fruit was in fact poisonous and the child died. *Held*, the Corporation was liable. The berries were obviously an allurement for the children and against such a danger the defendants should have given sufficient warning.

Liability for dangerous chattels

The liability for dangerous chattels has already been considered under the heading *'Rule in Rylands v. Fletcher'*. Here we shall discuss the liability of transferor of dangerous chattels to—

1. the immediate transferee, and
2. the ultimate transferee.

1. *Liability to immediate transferee. (a) Under contract.* Where a dangerous chattel is transferred under a contract, the liability of the transferor depends on the terms, express or implied, of the contract between the transferor and the transferee. The extent of liability, however, varies in different classes of contracts. It also varies with the occupation of the transferor ; it would be higher in the case of a chemist selling a dangerous chemical than in the case of a layman [*Taylor & Sons* v. *Union Castle S.S. Co.*, (1932) 48 TLR 249].

As regards the responsibility of the bailor for the transfer of a dangerous chattel under a contract of bailment, he is responsible even for those faults which are not known to him. But in gratuitous bailments, he is responsible only for those faults which are known to him and which are not disclosed.

Examples. (a) A hires a carriage of *B*. The carriage is unsafe, though B is not aware of it, and *A* is injured. *B* is responsible to *A* for the injury.

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(b) A hired a motor launch from *B* for a holiday on the river Thames. The launch caught fire and *A* was unable to extinguish it as the fire-fighting equipment was out of order. As such he was injured and suffered loss. *Held*, *B* was liable [*Reed*, v. *Dean*, (1949) 1 K.B. 188].

(b) Under gift. In the case of gift of a chattel, no liability attaches to the donor except to give warning in respect of the defects actually known to him.

(c) In tort. In addition to his liability under the contract, the transferor is also concurrently liable in tort for negligence to the transferee who is injured by the dangerous chattel.

Clarke v. *Army & Navy Co-op. Society Ltd.*, (1903) 1 K.B.155. *A* sold a tin of disinfectant powder to *C*. He knew that it was likely to be dangerous to *C* if it was opened without special care being taken. *C* opened the tin whereupon the distinfectant powder flew into her eyes, causing injury. *Held*, *A* was liable in tort to *C*, as he should have warned *C* of the probable danger.

(2) *Liability to ultimate transferee.* Suppose *A* transfers a dangerous chattel to *B* and *B* transfers it to *C* who is injured. Now the question is : How far is *A* liable to *C* for the injury ? The answer to this may be considered under the following two heads :

(a) Liability for fraud. If there is a fraud on the part of *A* in so far as he fradulently represents the chattel to be safe and misleads *C* and makes *C* to believe so, he is liable to *C* [*Langridge* v. *Levy*, (1837) 2 M.& W. 519].

(b) Liability for negligence. *A* is liable to *C* if he is guilty of a breach of a 'duty of care' to *C*. What this 'duty of care is', has already been discussed. A duty of care arises in the case of transfer of—

(i) Things dangerous *per se*, *i.e.*, dangerous in themselves, like firearms, poisons and explosives.

(ii) Things not dangerous *per se* but known to be so to the transferor.

(iii) Things which are defective.

Liability for dangerous animals

The liability in tort of a person for the wrongs that may be committed through the agency of animals under his control may be discussed under the following heads :

(1) Action under the *Scienter Rule.*

(2) Liability for the trespass of cattle.

(3) Ordinary tort liability for negligence.

(1) *Action under the Scienter Rule.* The word *'scienter'* comes from the Latin word *'scient'* which means 'knowing'. In case of animals *ferae naturae*, *i.e.*, animals dangerous or ferocious by nature, like gorillas, lions, tigers, bears, elephants, zebras, monkeys, *Scienter (i.e.*, knowledge) as to their dangerous nature is conclusively presumed and their owner is strictly liable even without proof of negligence for the damage caused by them if they escape. In case of animals *manesuetae natural*, *i.e.*, animals harmless by nature, like cows, horses, camels, dogs, cats, rabbits, the owner is liable for the damage caused by them only if it can be proved that the animal had the vicious propensity and the owner knew about it. The following cases illustrates the point :

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Behrens v. *Bertram Mills Circus*, (1926) 2 Q.B.1. A circus-trained elephant of the defendants, who were circus operators, was frightened by the barking of a dog. While running after the dog, it wrecked a booth and injured the plaintiff. *Held*, the defendants were liable as the animal is *ferae naturae*.

Buckle v. *Holmes*, (1957) 2 K.B. 125. The defendant's cat strayed into the plaintiff's house and ate 13 of the plaintiff's pigeons. *Held*, the defendant was not liable (as the cat had followed the natural instinct of its kind and was an animal *manesuetae naturae)* unless there was evidence that on previous occasions the cat had been straying and the defendant was warned.

Sycamore v. *Ley*, (1932) 147 L.T. 342. The defendant's dog was in his car parked at a beach. The glass shutters were down but the dog jumped out by breaking a shutter and bit a passerby. *Held*, the defendant was not liable as he had taken the necessary precaution by closing the shutters.

For exceptions to the rule of strict liability, refer to the exceptions to the *Rule in Rylands* v. *Fletcher*.

(2) *Trespass of cattle.* The term 'cattle' includes cows, bulls, oxen, buffaloes, horses, mares, asses, sheep, goats, lambs, pigs and poultry. It does not include dogs, cats or wild animals. If any damage is caused by trespass of cattle upon the land of another, the owner is liable even if the vicious nature of the cattle and the knowledge of the owner are not proved. This means the liability of the owner is strict and absolute.

Ellis v. *Loftus Iron Co.*, (1874) L.R. 10 C.P.10. The defendant's horse put its head over the plaintiff's fence and bit the plaintiff's mare. *Held*, the defendant was liable even without proof of knowledge of the vicious nature of the horse or negligence on the part of the defendant.

Lee v. *Riley*, (1856) 18 C.B. (N.S.) 722. The defendant's mare strayed on to the plaintiff's land through a defective hedge and kicked the plaintiff's horse with the result that it had to be killed. *Held*, the defendant was liable because of trespass of cattle which attracts strict liability.

(3) *Ordinary liability for negligence.* There are several ways in which torts may be committed by using animals as instruments. For example, nuisance may be committed through the instrumentality of animals by obstructing a right of way ; or assault and battery may be committed by setting a dog on a peaceable citizen. Likewise, the tort of negligence may be committed by the owner by not keeping proper control of animals on the highway.

Searl v. *Wallbank*, (1947) A.C. 341. The defendant's horse strayed on to a highway without his negligence. The plaintiff who was going on his bicycle collided with the horse and was injured. *Held*, the defendant was liable.

Nuisance

The word 'nuisance' is connected with the Latin word '*nocumentum*' which means 'harm or injury', or 'an annoying, upleasant or obnoxious thing or practice'. Nuisance as a tort means an "unlawful interference with, a person's use or enjoyment of land, or of some right over, or in connection with it." *(Winfield)*. In Pollock's words, it is "the wrong done to a man by unlawfully distribing him in the enjoyment of his property, or, in some cases, in the exercise of a common right". Examples of nuisance may be inter-

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ference with the comfort, health or safety of others through noise, heat, fumes, smell, smoke, dirt, damp, excavations or disease-producing germs.

Trespass and nuisance. The tort of 'trespass to land' and 'nuisance' may in some cases be a continuing trespass.

The points of distinction between 'trespass of land' and 'nuisance' are as follows:

Trespass	Nuisance
1. It is actionable *per se*.	1. In an action for nuisance, special damages must be proved.
2. It is a direct physical interference to land, *e.g.*, throwing rubbish on a neighbour's land or planting a tree on that land.	2. It need not be direct, *e.g.*, roots of a tree penetrating into a neighbour's land or allowing bricks from a ruinous chimney to fall on that land.
3. It is interference with a person's possession of land.	3. It is interference with a person's use or enjoyment of land.
4. It results from wrongful entry of an object or person on another's land.	4. No such entry is necessary. It may be created on defendant's own land, *e.g.*, an offensive smell is nuisance for the neighbour.

Public and private nuisance. Nuisance is of two kinds, namely :

(1) Public nuisance, and

(2) Private nuisance.

(1) **Public nuisance.** It is some unlawful act or omission which amounts to an infringement of a public right. This act or omission causes inconvenience or damage to the public by endangering or interfering with their lives, safety or comfort or by obstructing the public in the excercise of some common right.

Sec. 268 of the Indian Penal Code, 1860 provides in this regard as follows :

> "A person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right."

Examples of public nuisance. *(a)* Keeping a brothel.

(b) Selling food unfit for human consumption.

(c) Obstructing a highway by digging a trench.

(d) Exposing a person suffering from an infectious disease in public streets.

(e) Permitting a lamp overhanging a public highway to fall into disrepair so that it is liable to fall on persons using the highway.

(f) Erecting a factory which emits excessive smoke, fumes or dirt so as to cause discomfort to persons in the locality.

A public nuisance is a criminal offence and the person guilty of it is punishable under criminal law. No civil action can be brought against the guilty person unless the plaintiff has suffered some special damage. This is to avoid multiplicity of suits.

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Winterbottom v. *Lord Derby*, (1867) L.R.2 Exch. 316. The defendant blocked a public footway causing obstruction. The plaintiff brought an action alleging inconvenience and expense in removing the obstruction. *Held*, he could not recover as he had not suffered more damage than suffered by other members of the public. Kelly J. observed in this case : "If we were to hold that everybody who merely walked up the obstruction, or who chose to incur expenses in removing it might bring his action for being obstructed, there would really be no limit to the number of actions which might be brought."

In order that a person may bring a civil action in respect of a public nuisance—

(i) he must show a particular injury to himself beyond that which is suffered by the rest of the public ;

(ii) such injury must be direct and not a mere consequential injury ; and

(iii) the injury must be shown to be of a substantial character, and not fleeting or evanescent.

(2) **Private nuisance**. It is a civil wrong which results in some injury to the land or property of another (not amounting to trespass) or which substantially interferes with the use or enjoyment of property or an interest in property by the other. It is caused by a person on his own land but its consequences extend to the land of his neighbours.

Examples of private nuisance. (a) Causing an encroachment on one's neighbour's land.

(b) Causing physical damage to one's neighbour's land or property or vegetation upon it.

(c) Unduly intefering with one's neighbour in the comfortable and convenient use or enjoyment of his land or property.

Essentials of private nuisance. The essentials of a private nuisance or tort of nuisance are as follows :

(a) There must be *interference with the use or enjoyment* of land or some right over it. The interference must result in either injury to land or some personal discomfort or inconvenience. But a triffing or small inconvenience is not a nuisance. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality which are actually necessary for trade and commerce and for the benefit of the inhabitants of the town and the public at large.

(b) The plaintiff must show *title* to the thing to which the nuisance is alleged to be caused.

(c) The act complained of must result in *a damage* to the plaintiff.

Nuisance is not actionable *per se* ; some damage must have been caused to the plaintiff to enable him to sue.

Sic utere tuo ut alienum non laedas. The basis of law of nuisance is the rule : You must not make such use of your property as unreasonably and unnecessarily to cause harm to your neighbour (expressed by the Latin maxim: *Sic utere tuo ut alienum non laedas*). In broad terms this maxim means

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'live and let live, and be reasonable as to your acts or omissions in regard to your neighbours'.

Principles of private nuisance. The principles relating to private nuisance are by now well settled. In *Dhanna Lal* v. *Chittar Singh*, A.I.R. (1956) M.P. 240, these principles have been succinctly enumerated as under :

(a) Constant noise, if abnormal or unusual, can be an actionable nuisance if it interferes with one's physical comforts.

(b) The test of a nuisance causing personal discomfort is the actual local standard of comfort, and not an ideal or absolute standard.

(c) Generally, unusual or abnormal noise on defendant's premises which disturbs sleep of the occupants of the plaintiff's house during night, or which is so loud during day time that due to it one cannot hear ordinary conversation in the plaintiff's house or which cannot allow the occupants of the plaintiff's house to carry on their ordinary work is deemed to be noise which interferes with one's physical comforts.

(d) Even in a noisy locality, if there is substantial addition to the noise by introduction of some machine, instrument or performance at defendant's premises which materially affects the physical comforts of the occupants of the plaintiff's house, then also the noise will amount to actionable nuisance.

(e) If the noise amounts to an actionable nuisance, the defence that the defendant is making a reasonable use of his own property will be ineffectual. No use of one's property is reasonable if it causes substantial discomfort to other persons. "If a man creates a nuisance," said Kekewich J. in *Attorney General* v. *Cole & Sons*, (1901) 2 Ch. 205, 207, "he cannot say that he is acting reasonably. The two things are self-contradictory."

(f) If the defendant is found to be carrying on his business so as to cause a nuisance to his neighbours, he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner according to rules framed in this behalf either by the Municipality or by the Government. The latter defence can be effective in a case of public nuisance, but not in that of a private nuisance.

(g) If an operation on the defendant's premises cannot by any care and skill be prevented from causing a private nuisance to the neighbours, it cannot be undertaken at all, except with the consent of those injured by it.

(h) The right to commit a private nuisance can in certain circumstances be acquired either by prescription, or by the authority of a Statute.

The following cases may be noted :

Wilkes v. *Hungerford Market Co.* (1835) 2 Bing N.C.281. In this case, an obstruction was put up on a highway by the defendant. The plaintiff showed that many of his customers could not come to his shop on account of this obstruction. *Held*, the plaintiff could sue in tort for this public nuisance.

Bliss v. *Hall*, (1834) 4 Bing. N.C. 153. A tallow factory making candles had been emitting offensive smell for three years when the plaintiff took up residence nearby. *Held*, there was nuisance and it was no defence to say that the plaintiff came to the nuisance.

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St. Helens Smelting Co. v. *Tripping*, (1865) 35 L.J.Q.B. 66. The defendant's factory in this case emitted fumes which injured plaintiff's trees and shrubs. *Held*, there was nuisance.

Sturges v. *Bridgeman*, (1879) 11 Ch.D.852. The defendant, a confectioner and baker used pestle (an instrument used for crushing things) and mortar which made a considerable noise for 20 years on his premises which was near the garden of the plaintiff, a doctor. Thereafter, the plaintiff built a consulting room in this garden. The noise and vibration interfered with the plaintiff's practice. *Held*, there was a nuisance.

Christie v. *Davey*, (1893)1 Ch. 316. The plaintiff, a music teacher, used to play musical instruments for her practice in her house. The defendant whose premises were separated by a party-wall became exasperated with the playing of the instruments. To disturb the plaintiff, he wouuld retaliate by knocking on the wall and by whistling and shrieking. *Held*, this act of the defendant amounted to nuisance and he was liable.

Adams v. *Ursell*, (1913)1 Ch. 269. A fried-fish shop was opened near the plaintiff's house. He alleged that it was nuisance as it permeated his house with odour and vapour from the stove used in the shop. Although the shop served working-class area and supplied a public need, injunction was granted to the plaintiff.

Castle v. *St. Augustine's Links*, (1922) 38 T.L.R. 615. A game of golf was being played in a golf-links adjoining a road. A sliced golf ball hit the plaintiff, a taxi cab driver, as result of which he lost one of his eyes. *Held*, there was a public nuisance.

Hollywood Silver Fox Farm v. *Emmett*, (1936) 2 K.B. 468. The plaintiff, in this case, put up a sign-board over his land where he bred silver foxes. The defendant who owned an adjacent land objected over the erection of the sign-board as a result of which a dispute arose. The defendant sent his son to discharge a 12-bore shot gun near the plaintiff's land. The shot-gun frightened the plaintiff's vixen, affected their breeding habits and caused them to miscarry their young. *Held*, this was an actionable nuisance. Not only this, an injunction was also granted to restrain the defendant in future.

Mint v. *Good*, (1951)1 K.B.517. The plaintiff, an infant, while walking on a highway was injured by the collapse of a wall. He sued the landlord who was responsible for the repair of the wall. *Held*, there was nuisance.

Defences to an action for nuisance. The following defences may be pleaded in an action for nuisance :

1. *Prescription.* A right to continue a private nuisance (and not a public nuisance) can be acquired by a prescription if it has been peaceably and openly enjoyed as an easement and as of right without interruption for 20 years.

2. *Statutory authority.* An act done under the authority of a Statute is a complete defence.

3. *Triviality.* If the defendant proves that the act or omission is small and trivial, *e.g.*, smoke rising from an ordinary garden fire, the law may ignore it. *De minimis non curat lex* (The law does not concern itself with triffles) is the maxim in this regard.

4. *Reasonable use of property.* If the act or omission is reasonable having regard to the locality concerned, it is a defence.

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5. *Lawful use of land.* If the defendant proves that the use of his land is lawful, he is not liable.

6. *Act of God and inevitable accident.*

The following defences are, however, ineffectual :

1. That the plaintiff came to the nuisance.

2. That the particular act giving rise to nuisance is carried on at a convenient or suitable place.

3. That the particular act or trade or business is for the benefit of the public at large although it is nuisance to the plaintiff.

4. That the particular care and skill have been used to prevent the nuisance.

Malicious or injurious falsehood

When a person makes a malicious statement or false imputation with the intention of causing damage to another in respect of pecuniary interest (other than his personal reputation), he is said to have committed the tort of malicious or injurious falsehood.

Examples. . *(a) A* publishes a false statement that *B* has ceased to carry on his present business and intends to start a new business. The report is made maliciously to cause a decline in *A's* business. *B* can recover damages in tort.

(b) A trader makes a false statement to a customer that a travelling salesman with whom the customer had earlier dealt, is now in his employment. The trader is liable for malicious falsehood.

(c) A, a landlord, wanted to evict *B*, a tenant, who was registered as a tyre dealer at the address of the building so that he could sell the property. He informed the Post Office not to deliver *B*'s dak at that address. He also informed the tyre manufacturers' association that *B* had ceased to trade. *Held, A* was liable for malicious falsehood [*Joyce* v. *Motor Surveys Ltd.*, (1948) Ch. 252].

Injurious falsehood may take the form of—

(1) *Slander of title.* When a person makes a false and malicious statement about a person, his property or business, which damages, not necessarily his personal reputation, but his title to property or his business, or generally his business interest, he is said to have committed slander of title *(Winfield).* In simple words, slander of title is a false and malicious denial of the plaintiff's title to property.

Examples. (a) A falsely tells *B* that *C*'s house is haunted and as a result of this statement *C* is unable to sell the house. An action in this case lies for slander of title.

(b) At an auction sale, a bidder maliciously tells other bidders that the goods are stolen property. This results in loss in the auction. This is slander of title [*Gerrad* v. *Dickinson*, (1950) Cr. Eliz. 196].

(c) The plaintiff's trade was adversely affected by a false charge that the goods by him for sale were an infringement of a patent or copyright. *Held*, the defendant was liable for slander of title [*Malachy* v. *Soper*, (1836) 3 Bing (N.C.) 371].

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(2) *Slander of goods.* When a person falsely and maliciously says that another person's goods are of inferior quality and thus prejudices the latter's business, he is said to have committed the tort of slander of goods.

Passing off

When a person conducts his business in such a way that he leads members of the public to believe that his goods or business are the goods or business of another, he is liable for the tort of passing off. The essence of passing off is that *A* represents his goods as goods of *B* which have established for themselves a name or goodwill in the market. The usual forms by which passing off takes place are by imitation of labels or get-up or appearance of the goods of competitors or by selling them under the same or a similar name.

Salmond mentions the following forms of passing off :

(a) A direct statement that the merchandise or business of the defendant is that of the plaintiff.

(b) Trading under a name so closely resembling that of the plaintiff as to be mistaken for it by the public.

(c) Selling goods under a trade name already appropriated for goods of that kind by the plaintiff, or under any name so similar thereto as to be mistaken for it.

(d) Selling goods with the trade mark of the plaintiff or any deceptive imitation attached thereto.

(e) Imitating the get-up or appearance of the plaintiff's goods so as to deceive the public.

(f) Selling second-hand goods as new goods manufactured by the plaintiff.

Actual damage or deception is, however, not necessary. The law presumes that if the goodwill of a man's business has been interfered with by the passing off of goods, damage results therefrom.

In India, the Trade and Merchandise Marks Act, 1958 and the Patents Act, 1970 protect the traders by making the infringement of trade marks or patent rights punishable under these Acts.

Conspiracy

When two or more persons, without lawful justification, combine for the purpose of wilfully causing damage to the plaintiff, and actual damage results therefrom, they commit the tort of conspiracy (*Winfield*). The purpose of the combination should be inflicting of the damage by means of an unlawful act or a lawful act done in an unlawful manner on the plaintiff, as distinguished from serving the *bona fide* and legitimate interests of those who so combine. The tort of conspiracy is not committed by a mere agreement between the parties ; it is committed only when actual damage results to the plaintiff. Thus, if a spectator hisses at or hoots an actor in a theatrical show, it is not actionable as hissing at a theatre is *prima facie* a lawful act [*Gregory* v. *Duke of Brunswick*, (1844) 6 M & G 205]. But if several persons maliciously conspire and combine beforehand to hoot an actor, they would be commiting the tort of conspiracy.

Lord Caveas described the following three cases as "a famous trilogy of cases" in *Sorrell* v. *Smith*, (1925) A.C.700 :

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Mogul Steamship Co. v. *Mcgregor, Gow & Co.*, (1892) A.C. 25. The defendants, an association of shipowners, combined together to obtain a monopoly of the tea trade from China by offering reduced freight charges to exporters who only shipped by their vessels. The plaintiffs, the Mogul S.S. Company, a shipping company on the same route, was excluded from the combination and was, therefore, driven out of trade. They brought an action against the defendants for conspiracy. *Held*, there was no cause of action against the defendants. The House of Lords observed in this case that "trading loss resulting from the competition of rivals, acting in combination to promote their business interests by lawful means, is *damnum sine injuria*."

Allen v. *Flood*, (1898) A.C. 1. An official of an iron workers' trade union threatened a certain employer that unless he discharged a certain employee, all the iron workers would strike work. The employer who was entitled to discharge that employee any time, discharged the employee, the plaintiff, who proceeded against the official of the trade union, the defendant. *Held*, there was no cause of action as there was no combination. It was observed in this case that an act lawful in itself is not converted into a tortious act by malicious or bad motive.

Quinn v. *Leatham*, (1901) A.C. 495. *L*, a butcher, had a dispute with a trade union with respect to the employment of certain non-union men. The trade union officials asked *L* to replace non-union employees with the union employees but *L* declined to do so. Thereupon these officials maliciously conspired to induce *L*'s customers and servants not to deal with *L*. *Held*, *L* was entitled to damages for the loss which he had sustained through the withdrawal of his customers. A conspiracy to injure gives a cause of action.

Lord Caveas observed in *Sorrell* v. *Smith*, (1925) A.C. 711 that the law regarding tortious conspiracy as discussed in the above three cases was in a state of chaos and created great difficulty in reconciling these cases.

Sorrell v. *Smith*, (1925) A.C. 700. A trade union of retail news agents, with a view to limiting the number of retail newspaper shops in a particular area, threatened to cut off supply to a distributor unless he discontinued supply to the plaintiff. *Held*, they had not committed any actionable wrong as they had acted for the sole purpose of protecting their trade and were not actuated by spite or any desire to injure the plaintiff.

The House of Lords laid down two propositions in this case :

(1) A combination of two or more persons wilfully to injure a man in his trade is an unlawful act and, if it results in damage to him, it is actionable.

(2) If the real purpose of the combination is not to injure another, but no promote or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues.

The above cases were neatly summed up in the case of *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*, (1942) A. C. 435. This case has re-stated the law in the light of modern industrial conditions.

Crofter Hand Woven Harris Tweed Co. v *Veitch*, (1942) A.C. 435. The Crofters were small producers of Harris tweed in the island of Lewis. The workmen's union wanted that the Crofters should employ only the union members as spinners and raise their wages. The Crofters could meet this demand only if the competition of the plaintiffs was eliminated. The union officials thereupon instructed the dockers (who were also the members of the workers' union) to stop the importation of yarn

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of the plaintiffs. This was done in the interest of the workers. The combination of the Crofters and the union officials resulted in loss to the plaintiffs. Held, there was no actionable wrong.

In the light of the cases discussed above, the position may be summed up as under :

(1) There is a tort of conspiracy if the predominant purpose of the combination is *deliberately* to inflict damages on the plaintiff.

(2) If the predominant purpose is to protect the legitimate trade interest of the defendants, there is no actionable conspiracy although the subsidiary purpose is to damage the plaintiff.

(3) If the defendants use unlawful means, their conduct is tortious, whatever their object may have been.

(4) The defendants are not liable merely because they were actuated by spite or ill-will, as as long as the means used are not unlawful.

PART THREE—REMEDIES IN TORTS

There are two main classes of remedies which are available to a plaintiff in an action for a tort. These are :

1. *Judicial remedies, i.e.*, remedies by way of an action at law. These include—

(1) Damages,

(2) Injunction, and

(3) Specific restitution of property.

2. *Extra-judicial remedies, i.e.*, remedies outside the Court of law by way of self-help. These include—

(1) Self-defence, and

(2) Self-redress which includes—

(a) Prevention of trespasss,

(b) Re-entry on land,

(c) Re-caption of goods,

(d) Abatement of nuisance, and

(e) Distress damage feasant.

JUDICIAL REMEDIES

1. Damages

This is the most important and common remedy for a tort, availed of by the plaintiff as a compensation for any loss suffered by him. This also serves as deterrent punishment to the defendant so that he does not repeat in future the act for which he is punished.

Damages may be of the following kinds :

(a) Nominal damages. Sometimes there is an infringement of the plaintiff's right without any actual loss to him, as in case of trespass. In such a case, the Court may, in recognition of the legal right of the plaintiff, award nominal damages, say a rupee or a pence. The leading cases on this point are :

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Ashby v. *White*, (1903) 2 Ld. Rayam. 938. In this case it was held that a voter wrongfully prevented from exercising his voting right by the returning officer was entitled to recover damages. Holt C.J. observed : "So a man shall have an action against another for riding over his ground, though it did him no damage : for it is an invasion of his property and the other has no right to come there."

Constantine v. *Imperial London Hotels*, (1944) K.B. 693. *C*, a famous West Indian Cricketer, was wrongly refused accommodation in a hotel of his choice though he was accommodated in one of the hotels of the defendants. He was awarded damages of 5 guineas.

(b) Contemptuous damages. 'Contemptuous' means 'showing contempt or low opinion'. When the Court forms a very low opinion of the plaintiff's legal claim, it awards to him a very trifling amount as damages, known as contemptuous damages. The rule of law in this regard is : *De minimis non curat lex, i.e.*, the law does not care for trifles.

Example.: A makes some offensive remark against *B* and *B* in return incites his dog to spring upon *A* who is in consequence injured. The Court might award to *A* in this case only contemptuous damages.

Nominal damages are awarded where the plaintiff has suffered no loss but the tort is actionable *per se ;* contemptuous damages, on the other hand, are awarded where the plaintiff has suffered loss but he does not deserve to be compensated.

(c) Compensatory, ordinary or substantial damages. These are the damges which are allowed to the plaintiff as a compensation for the actual loss suffered by him as a result of the tort. They are a fair and genuine estimate of the loss suffered by the plaintiff by the wrongful act of the defendant [*Hadley* v. *Baxendale*, (1854) Ex. 341]. By nature, these damages are 'compensatory'.

(d) Exemplary, vindictive or punitive damages. When damages awarded are in excess of the actual material loss suffered by the plaintiff, more as a solatium (a compensation given as solace for suffering or injured feelings) for an insult or other outrage to personal feelings that is involved in the injury complained of rather than as a compensation, they are called exemplary damages. These damages are by way of punishment to the wrong-doer, *i.e.*, the defendant, and the idea behind these damages is to prevent recurrence of similar behaviour on the part of the defendant in future. Note the following case in this regard :

London v. *Ryder*, (1953) 1 All E.R. 741. *F* transferred a flat to her daughter, *D*. In the absence of the tenant, *T*, who had been let that flat, *D* occupied the flat. When *T* returned, he dragged down the stairs *D* who suffered a nervous shock. *Held*, *D* was entitled to exemplary or punitive damages because of 'the outrage committed' against her and the damages also included compensation not only for the physical treatment, but for the way in which she was treated.

In case of an insult or injury to personal feelings of the plaintiff the Court may take into account the motive for the wrong and award an increased amount of damages, called *aggravated damages*. For example, If *A* trespasses into *B*'s land, ordinary damages would be awarded, but if he creates some nuisance there, aggravated damages may be awarded.

(e) Prospective or future damages. Sometimes a wrongful act of the defendant may result in consequences which may have a continuous effect, *e.g.*, personal

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injury to the plaintiff which cripples him. In such continuing tort the Court, while awarding damages, takes into account not only the loss suffered by the plaintiff up to the date of the filing of the suit but also the probable future loss to the plaintiff in terms of medical treatment or loss of pleasures of life or enjoyment of normal life or incapacity or diminished capacity for work or loss of earning capacity. The damages awarded by the Court in such a case are called prospective or future damages. The following case illustrates the point :

Y.S. Kumar v. *Kuldip Singh*, A.I.R. (1972) P. & H. 326. *A* was knocked down by a motor-cycle. As a result of the accident, he suffered permanent disability which affected enjoyment of his normal life. The Court awarded him damages at the rate of Rs. 50 per month for 12 years.

In *Ganapaty* v. *State of Mysore*, A.I.R. (1960) Mys. 222. Somnath Iyer J. observed as follows :

"In an action for damages for personal injuries caused to the plaintiff in an accident, the plaintiff is entitled to be compensated for the pain and suffering undergone by him as a result of the accident as also in respect of the general impairment of his health, if there has been any such impairment, and reduced capacity for work, if there has been lowering of his endurance or stamina in that regard, besides the special damages awardable to him for the expense which he had to incur for his treatment during the period he was an in-patient in the hospital...."

Thus prospective damages may be awarded, *inter alia*, for the following :

(i) Loss of future earnings, taking into account the additional loss due to future inflation.

(ii) Cost of medical treatment.

(iii) Illness due to nervous shock.

(iv) Loss due to deprivation of one's favourite recreations or hobbies.

(v) Shortening of expectation of life.

(iv) Pain and suffering.

Damages to be recovered once for all. In a suit for tort, if damages are claimed and awarded once, the plaintiff loses the right to bring any subsequent suit for the same action. This is also known as rule in *Fetter* v. *Beale*, (1701) 1 Ld. Raym. 339. In this case, the plaintiff recovered a sum of £ 11 as damages in an action against the defendant for assault and battery. Subsequently owing to the same injury, a bone of his skull had to be removed. In a second suit to recover compensation, it was held the action could not lie.

Exceptions. In the following cases, subsequent actions for the same wrongful act may be taken :

(a) Where two distinct rights are violated

Brunsden v. *Humphrey*, (1884) 14 Q.B.P.141. Due to the negligence of the defendant, an accident was caused as a result of which *(i)* the plaintiff's car was damaged, and *(ii)* he was also injured. In one action he recovered compensation for damage to his car. In the second action, he claimed compensation for personal injuries. *Held*, he was entitled to bring second action as it was for violation of a distinct right.

(b) When the injury is a continuing one.

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2. Injunction

An injnuction is an order of the Court *(a)* restraining the commission or continuance of some wrongful act, or continuance of some wrongful omission (known as *prohibitory injunction*), or *(b)* directing the doing of some act to prevent the breach of an obligation (known as *mandatory injunction).* The grant of injunction is entirely in the discretion of the Court. It cannot be claimed as a matter of right.

3. Specific restitution of property

Where the plaintiff has been wrongfully dispossessed of some movable or immovable property, the Court may order for the restoration of property to him [Secs. 6 and 7 of the Specific Relief Act, 1963].

EXTRA-JUDICIAL REMEDIES

There are certain remedies which are available to a person to redress his injuries by means of self-help, without going to a Court of law. These remedies are known as *extra-judicial remedies.* But "self-help is apt to be a perilous remedy, for the person excercising it is probably the worse judge of exactly how much he is entitled to do without exceeding his rights."

The various extra-judicial remedies are as follows :

1. *Self-defence.* Every person is entitled to protect himself or any other person against an assault or battery by using reasonable force.

2. *Self-redress.* This includes—

(a) Prevention of trespass. An occupier of land or any person authorised by him may, by using reasonable force, prevent a trespasser or a trespassing animal to enter his land, or may turn him or it out if he or it has already trespassed. This remedy is sometimes risky as this many times occasions tumults and disorders.

(b) Re-entry on land. A person who has been wrongfully dispossed of land may retake its possession peacefully or by the use of a reasonable force.

(c) Re-caption (taking back) of goods. If a person has been wrongfully deprived of possession of goods to which he is entitled, he has the right to recover them back peacefully or by the use of reasonable force.

(d) Abatement of nuisance. If any nuisance injuriously affects the land of its occupier, he may abate it *(i.e.,*terminate it by his own act). If, for example, branches of a neighbour's tree overhang in *X*'s house or its roots spread to *X*'s house, *X* may cut them. In *James* v. *Williams,* (1843) 11 M. & W. 176, it was held that before abatement is made, notice to the other party is required unless the nuisance is one which if allowed to continue, will be a danger to the life or property. In any case, the abatement should not result in any avoidable damage to the other party.

(e) Distress damage feasant. When goods or cattle trespass on someone's land, he may lawfully seize them. He may further detain them until compensation for the trespass, which causes damage to him, is paid. The right of the occupier of land is known as 'distress damage feasant'.

TEST QUESTIONS

1. What do you understand by a Tort ? Distinguish it from breach of contract.

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2. Explain the maxim "*Violenti non fit injuria*". What are the exceptions to this maxim ?

3. What do you understand by—

(a) Injuria sine damno, and

(b) Damnum sine injuria ?

Give examples of each. *(C.S.E. December 1989, 1991)*

4. Enumerate and discuss the persons who cannot sue for a tort.

(C.S.E. June 1977)

5. "Tort implies a loss to the plaintiff. However, it is not correct to say that every loss arising out of another person's action will be compensated under law of torts." Comment. *(C.S.E. June 1991)*

6. Explain the legal maxim: "QUI FACIT PER ALIUMM FACIT PER SE."

(C.S.E. October 1969)

7. Discuss the liability of the master for wrongful and negligent acts of his servant.

(C.S.E. October 1974)

8. What is the extent of the duty imposed by the rule in *Rylands* v. *Fletcher* that a man keeps dangerous things at his peril ? *(C.S.E. April 1976)*

9. What are the various remedies in tort available to the plaintiff ?

10. *(a)* What is the liability of the State for the tortious acts of its servants ?

(b) Distinguish between nominal and exemplary damages.

(C.S.E. December 1990)

11. What are the different classes of torts recognised by law ? Enumerate them briefly.

12. What is false imprisonment ? Distinguish it from malicious prosecution.

13. What is malicious prosecution ? What are its essential ingredients ?

14. Explain the ingredients of trespass against person and distinguish between assault and battery.

15. "Assault is inchoate battery." Discuss.

16. What is trespass ? What are the various defences to it ?

17. Define trespass to land. What must be proved by a plainitff to succeed in a suit for trespass to land ?

18. Distinguish trespass to goods from conversion and detinue, with the help of illustrations.

19. Define negligence. What are its essential ingredients as a tort ?

20. Explain what is meant by contributory negligence.

21. What are the defences of a defendant in an action for negligence ?

22. Explain '*Res ipsa loquitur*' and '*mens rea*'. *(C.S.E. December 1991)*

23. Explain the tort of Nervous Shock.

24. Explain the liability in damages for damage done by the owner of a dangerous thing, through the use or carriage of that thing.

25. Discuss the liability of an occupier of premises towards a person who comes thereon in pursuance of a contract.

26. Discuss the liability of an occupier of premises towards an invitee, a licensee and a trespasser.

27. Explain the nature of defamation.

28. "Libel is addressed to the eye and slander to the ear." Comment.

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29. Distinguish between libel and slander.

30. "Liability for libel does not depend on the intention of the defamer but on the fact of defamation." Comment.

31. What amounts in law to publication of a defamatory statement ?

32. Distinguish between words defamatory in their ordinary sense and words defamatory by innuendo.

33. What are the various defences to an action for defamation ?

34. Write short note on : Vicarious liability. *(C.S.E. May 1990)*

35. How far is a *'fair comment'* a defence to an action for damages for libel ?

36. What kinds of statements are absolutely privileged so that no action will lie in respect of them, however false, defamatory and malicious they may be ?

37. Distinguish between a public nuisance and a private nuisance.

38. State the defences open to a defendant in an action for nuisance.

39. Discuss the essentials of private nuisance.

40. Write short notes on :

(a) Violenti non fit injuria (*C.S.E. June 1993*). *(b)* Inevitable accident. *(c) Injura sine damno. (d)* Vicarious liability of the State. *(e)* Distress damage feasant. *(f)* Assault. *(g)* Malicious prosecution. *(h) Res ipsa loquitur. [C.S.E. June 1993] (i)* Innuendo. *(j)* Trespass *ab initio. (k)* Conversion and detinue.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. Amit, Sumit and Sandeep form a partnership and offer stiff competition to Daljit, the only person remaining in that type of trade ; their sole intention is to force him out of competition. Can Daljit sue the partners for losses incurred by him ?

(C.S.E. December 1986)

[**Hint** : No. *Damnum sine injuria*].

2. Chief Fire Officer of Calcutta Municipal Corporation orders watering of a certain building which is situated next to another building which is ablaze, as a result of which cotton stock of Bijoy & Co. is damaged. Can they claim damages from the Municipal Corporation or against the Chief Fire Officer personally ? *(C.S.E. December 1986)*

[**Hint :** No. Rescue operation is a defence against an action in tort].

3. In the parliamentary by-election of 1988, Abhishek was a qualified voter. The returning officer wrongfully refused to register the duly tendered vote by Abhishek. No loss was suffered by Abhishek because the candidate to whom he wanted to vote was declared elected. Yet Abhishek sued the returning officer for damages . Will he succeed ? *(C.S.E. June 1989)*

[**Hint :** Yes. *Ashby* v. *White*].

4. A's servant left a two-horse van unattended in a street. A boy threw a stone at the horses and they bolted causing danger to women and children on the road. A police constable on duty rushed and stopped the horses. But in doing so, he himself sustained injuries. Can the constable claim damages from *A* ? *(C.S.E. December 1989)*

[**Hint :** Yes. *Haynes* v. *Harwood*].

5. The defendants, shipowners, had been engaged in carrying tea to China, offered reduced freight rates to shippers with a view to monopolise the trade and to oust the plaintiff from the trade. The result was that the plaintiff, a rival trader, was driven out of the trade and suffered heavy losses. Can the plaintiff get compensation for his losses ? *(C.S.E. June 1990)*

[**Hint :** No. *Damnum sine injuria*].

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6. The Municipal Corporation of town pulls down a building which a declared unifit for human habitation. An affected tenant wants to sue the Municipal Corporation for damges. Will he succeed ? *(C.S.E. December 1991)*

[**Hint :** No, as the act of the Municipal Corporation is the act of necessity].

7. Alpana goes to watch a cricket match. She is hit by the sixer hit by a batsman. She wants to file a suit against the bowler who bowled a loose ball. Will she succeed ? *(C.S.E. December 1991)*

[**Hint :** No, as the case falls under *volenti non fit injuria* (*Hall* v. *Booklands Auto Racing Club*, (1933) 1 .K.B. 205].

8. A doctor of a State Government hospital was negligent while conducting an eye operation of *P* due to which he became blind, *P* sues the State Government for damages Will he suceed ? *(C.S.E. December 1990)*

[**Hint :** Yes. the State Government is vicariously liable].

9. A publishes a statement that *B* has been sentenced to pay a fine of Rs. 100 or to undergo imprisonment for 3 weeks. In fact *B* was ordered to undergo in the alternative imprisonment for only 2 weeks. *B* files a suit against *A* for recovery of Rs. 5,000 as damages for injuring his reputation by publishing an incorrect statement relating to him. Will the Court give a verdict in favour of *B* ? *(C.S.E. June 1992)*

[**Hint :** No, as the statement is substantially true but inaccurate in a mere detail (*Alexander* v. *N.E. Rail.*), (1865) 6 B.&.C. 370)].

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3

Constitution of India

India, a Union of States, is a Sovereign Socialist Secular Democratic Republic with a parliamentary system of government. The Republic is governed in terms of the Constitution, which was adopted by the Constituent Assembly on 26th November, 1949 and came into force on 26th January, 1950.

The Constitution which the people of India gave unto themselves as a free people, through representatives assembled in a sovereign Constituent Assembly, is a unique document. It reflects in a manner, which perhaps very few other Constitutions do, the values which we as a people have cherished through the ages and, more particularly, the beliefs, faiths and aspirations which we had come to imbibe during the years of our national struggle for freedom. It is indeed a statement of faith and a blueprint for future of an ancient people reborn as a modern State.

The Constitution is federal in structure with unitary features and the President of India is the constitutional head of the executive of the Union. Though the Constitution says that the executive power of the Union is vested in the President, it also specifies that he shall excercise this power 'in accordance with the Constitution'. Article 74 (1) of the Constitution enjoins that there shall be a "Council of Ministers with the Prime Minister at the head to aid and advise the President in the excercise of his functions." The real executive power thus vests in the Council of Ministers headed by the Prime Minister, collectively responsible to the Lok Sabha (House of the People). Similarly, in the State, the Governor occupies the position of the head of the executive of the State, but it is virtually the Council of Ministers with the Chief Minister at the head, collectively responsible to the Legislative Assembly of the State, which carries on the executive government.

Under the Consitution, the areas of jurisdiction of the Union and States are demarcated. The constituent and residual powers of legislation are vested in Parliament of the Union.

The parliamentary system of government in India is based on adult suffrage, whereby all citizens of India who are not less than 18 years of age and are not disqualified on certain grounds like non-residence, unsoundness of mind, illegal or corrupt practices have the right to be registered as voters in any election to the Lok Sabha and to the Legislative Assemblies of the States.

The Constitution also has provisions for the independence of the judiciary, the Comptroller and Auditor-General of India, and the Public Service Commissions, and the Judiciary has been separated from the executive at all levels throughout the country.

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HISTORY OF CONSTITUTION

Government of India Acts of 1919 and 1935. "All Constitutions are the heirs of the past as well as the testators of the future." [Jennings, *Some Characteristics of the Indian Constitution* (1953), p.56]. So is our Constitution. It has its roots in the Government of India Act, 1919, and the Government of India Act, 1935. The Act of 1919 introduced the system of *'diarchy'* in the Provinces whereby provision was made for classifying subjects as Central and Provincial. The structure of the Government, however, remained unitary. The Central Legislature had the power to legislate on any matter so that it was not possible to challenge the validity of any Central legislation. Whether a particular matter was a Central or Provincial matter was decided by the Governor-General in Council and not by the Courts.

Division of powers under the Act of 1935. The Act of 1935 also made division of powers between the Centre and the Provinces. Certain subjects were exclusively assigned to the Central Legislature, and others to the Provincial Legislatures. The two had also concurrent powers of legislation over certain matters. Residuary powers of legislation could be assigned by the Governor-General to the Provinces or the Centre. The Act also set up a Federal Court which had original jurisdiction in any dispute between the Centre and the Pronvinces. The Federal Court had appellate jurisdiction and also excercised advisory jurisdiction to give its opinion on a question of law to the Governor-General on reference.

Constituent Assembly. The present Constitution was framed by the Constituent Assembly which was set up in 1946 under the Cabinet Mission Plan. The Constituent Assembly appointed a number of Committees to deal with different aspects of the constitutional problems. The reports of various Committees were considered by the Assembly and their recommendations were adopted on the basis of which the Draft Constitution was prepared. The Draft Constitution contained 315 Articles and 8 Schedules. A number of amendments were made to the Draft Constitution. The Constituent assembly finalised the Constitution of November 26, 1949. It came into force on January 26, 1950.

FEDERAL CONSTITUTION

The Indian Constitution is basically federal, although it has many striking unitary features. The essential features of a federal Constitution are as follows :

1. *Dual government.* In a unitary State there is only one Government, *i.e.*, the national Government. For administrative convenience, the national Government may create local sub-divisions. But the administrators of these subdivisions enjoy only delegated powers which may be revoked by the national Government any time at its will.

In a Federal State, which is the fusion of several States into a single State in regard to matters affecting common interests, there are two Governments—the Federal Government or the Union Government and the Governments of each component unit, *i.e.*, State Governments. The State Governments enjoy autonomy in regard to certain matters. Both the Federal Government and the State Governments draw authority from the Constitution of the country.

2. *Distribution of powers.* A Federal State essentially involves a division of powers between the Federal Government and the State Governments.

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In the Indian Constitution powers are divided not only between the Union Government (List 1 or Union List) and the States (List II or State List) but there is a third list termed as the Concurrent List (List III) which enumerates subjects on which both the Union and the States can make laws. This existence of Concurrent List is not in any way incompatible with a Federal Constitution or the federal principle, So long as there are some matters under the exclusive control of the Union Government and some matters under the exclusive control of the State Governments, the federal principle is implemented.

3. *Supremacy of the Constitution.* The Constitution is supreme in a Federal State which as a matter of fact derives its existence from the Constitution. Further, the provisions of the Constitution relating to distribution of powers—executive, legislative or judicial—between the Union Government and the component units, *i.e.*, the State Governments, are supreme. This means every power, whether it belongs to the Union Government or the State Governments, is subordinate to and controlled by the Constitution. Another necessary concomitant of the clear distribution of powers between the Union Government and the State Governments is that the Constitution must invariably be a written Constitution which clearly defines the respective powers of the Union Government and the State Governments. This is clearly so in the case of Indian Constitution.

4. *Independence of judiciary.* In a Federal State, it is essential to have independent judiciary for preserving the sanctity of the Constitution, and interpreting the Constitution. This is also necessary for *(a)* maintaining the division of powers between the Union Government and the State Governments and also between the subordinate branches of the Government, and *(b)* avoiding encroachment upon each other's powers and sphere of activity by nullifying any action on the part of the Union Government or State Governments or their different organs which violate the provisions of the Constitution.

Our Constitution has provisions for the independence of the judiciary, the Comptroller and Auditor-General of India, and the Public Service Commissions, and the Judiciary has been separated from the executive at all levels throughout the country.

In hierarchy of Courts, the Supreme Court in our country is the highest Court to safeguard this distribution of powers and to nullify any action which violates any provision of the Constitution.

Our federal system possesses all the above characteristics of a federal Government.

SALIENT FEATURES OF THE INDIAN CONSTITUTION

The Peamble to our Constitution which sums up the basic philosophy of our Constitution declares India to be a Sovereign Socialist Secular Democratic Republic. The other salient features of our Constitution which emphasise democratic structure of Government are as follows :

1. *Largest written Constitution.* The Constitution of India is a written Constitution containing as many as 395 Articles and 10 Schedules. As originally passed it contained 395 Articles and 8 Schedules. It is the bulkiest and the largest Constitution in the world. The Constitution of U.S.A. contains just 7 Articles, that of Australia 128 Articles and that of Canada 147 Articles.

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The Constitution of India was prepared after "ransacking all the known Constitutions of the world". Ivor Jennings describes it "as the longest and most detailed in the world" while H.V. Kamath, a member of the Constituent Assembly, referred to it as of elephantine size. Most of its provisions are substantially borrowed from other Constitutions. In spite of the limitation that our Constitution is mostly a borrowed one, it has worked admirably well during the last 42 years.

The bulk of our Constitution is the result of a zealous attempt by the framers of the Constitution to—

(1) incorporate the best features of each of the existing Constitutions and adapt them to the existing conditions and needs of our country ;

(2) avoid loopholes and defects that could possibly be anticipated in the working of the Constitution ;

(3) make provision for matters of administrative details which have been adapted from the Government of India Act, 1935 with a view *(i)* to make working of infant democracy smooth, *(ii)* to avoid any surreptitious subversion of the Constitution and *(iii)* not to lose sight of the peculiar problems of our vast country, *e.g.*, governance of States, different languages, safeguarding the interests of the Schedule Castes and Tribes and other backward classes ;

(4) incorporate non-justiciable rights in the form of Directive Principles of State Policy which are in the nature of instruments of instruction to the Government as regards their legislative and executive powers ; and

(5) incorporate provisions relating to relations between the Union Government and the States, whether legislative or administrative, so as to eliminate conflicts as far as possible.

2. *Partly federal and partly unitary.* Our Constitution is essentially federal in character with many unitary features and the President of India is the constitutional head of the executive of the Union. Though the Constitution says that the executive power of the Union is vested in the President, it also specifies that he shall excercise this power 'in accordance with the Constitution'. Article 74 (1) of the Constitution enjoins that there shall be a "Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions." The real executive power thus vests in the Council of Ministers headed by the Prime Minister, collectively responsible to the Lok Sabha (the House of the People). Similarly, in the States, the Governor occupies the position of the head of the executive of the State, but it is virtually the Council of Ministers with the Chief Ministers at the head, collectively responsible to the Legislative Assembly of the State, which carries on the executive government.

In normal times our Constitution works on federal principles. But in times of war and other emergencies it becomes a unitary Constitution. It was to emphasise strong unitary features of our Constitution that Dr. Wheare observed that "India is a unitary state with subsidary federal features rather tnan a federal state with subsidiary unitary features."

3. *Parliamentary type of Government.* Our Constitution establishes the parliamentary type of Government on the British model. Parliamentary democracy has three important characteristics, namely :

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(i) the executive is responsible to the Lower House *(i.e.,* Lok Sabha in India).

(ii) the Lower House has a democratic basis *(i.e.,* it is elected by the people), and

(iii) the ultimate legislative and financial control is vested in this Lower House.

The parliamentary system of government in India is based on adult suffrage, whereby all citizens of India who are not less than 18 years of age and are not disqualified on certain grounds like non-residence, unsoundness of mind or corrupt practices have the right to be registered as voters in any election to the Lok Sabha and to the Legislative Assemblies of the States.

4. *Partly rigid and partly flexible.* The Constitution of India is partly rigid and partly flexible. There are certain provisions which can be amended by a simple majority in Parliament, while there are certain other provisions whose amendment requires not only a special majority in Parliament but also ratification by at least one-half of the State Legislatures. Pandit Nehru observed in this regard :

> "While we want this Constitution to be as solid and permanent as we make it, there is no permanence in Constitutions. There should be a certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. In any event, we would not make this Constitution as rigid that it cannot be adapted to changing conditions. When the world is in turmoil and we are passing through a very swift period of transition, what we may do to-day may not be wholly capable tomorrow."

The Indian Constitution strikes " a good balance between extreme rigidity and too much flexibility." (Dr. Wheare)

5. *Fundamental Rights.* The Constitution guarantees to the citizens of India certain rights known as Fundamental or Constitutional Rights. These rights are justiciable and are discussed in detail later in this Chapter.

6. *Directive Principles of State Policy.* These are the guiding principles which the State ought to follow in framing laws and enforcing them. Although these principles are not enforceable in the law Courts yet they are fundamental in the governance of the country. These are discussed in detail later in this Chapter.

7. *Fundamental Duties.* The Forty-second Amendment Act, 1976 has prescribed certain 'Fundamental Duties' for every citizen of the country. These duties like the Directive Principles of State Policy cannot be judicially enforced.

8. *A Secular Socialist State.* The citizens of our country are free to follow any religion and they enjoy equal rights without any distinction of caste, creed, religion or sex. Article 15 (1) specially provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The Constitution thus establishes in India a secular State. Although in the Constitution as originally framed the word 'Secular' was nowhere specifically used, the Forty-second Amendment did include the word 'Secular' in the Preamble. Article 25 (1) also provides that subject to public order, morality and health and to the other provisions, all

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persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

9. *Social equality.* The Constitution aims at securing to every citizen not merely political or legal equality, but also *social* equality. Not only that the State will not disciminate between one citizen and another merely on the ground of religion, race, caste, sex or place of birth, in the matter of appointment, or other employment offered by the State, but also the practice of 'untouchability' in any form is prohibited. The Directive Principles constitute the conscience of the Constitution and spell out the basic rights of human beings in our society.

10. *Universal adult franchise.* Article 326 grants universal adult franchise to all citizens of India who have attained the age of 18 years. The Article runs thus :

> "The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than eighteen years of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election."

11. *Independence of judiciary.* An independent judiciary, having the power of judicial review, is another important feature of our Constitution.

PREAMBLE

The Preamble states that the people of India have solemnly resolved to constitute India into a "Sovereign Socialist Secular Democratic Republic." Then it summarises the aims and aspirations embodied in the Constitution. The Preamble is reproduced below :

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a 'SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC' and to secure to all its citizens :

JUSTICE, social, economic and politicial ;

LIBERTY of thought, expression, belief, faith and worship ;

EQUALITY of status and of opportunity ;

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation ;

IN OUR CONSTITUENT ASSEMBLY, this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The Constitution contains an epitome of the ideals, objectives, and aspirations of the social order within the Sovereign Socialist Secular Democratic Republic established under the Constitution. It has been given the pride of place by the Constitution-makers.

Utility of the Preamble. The utility of the Preamble is very limited. It is not enforceable in any Court of law nor is it the source of any substantive power.

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Yet it is the most sacred part of the Constitution. It is a key to open the minds of the makers of the Constitution and the mischiefs they intended to redress. Its utility lies in this that if the language of the Constitution is found to be ambiguous anywhere, we may turn to the Preamble to seek clarification. It has been held in several decisions of the Supreme Court that the Constitution is to be read and interpreted in the light of the visions and values, pledges and sentiments expressed in the Preamble. The Preamble truly represents the soul of our Constitution.

From the Preamble three important observations in relation to the Constitution can be made. *Firstly*, subject to the addition of the word "socialist" in the Preamble by the 42nd Amendment, it does not profess to commit the country to any particular economic order. Consistent with the Directive Principles of State Policy and within the broad framework of socialism, India may set up any economic order which the people may choose to adopt through the institutions provided for in the Constitution. *Secondly*, the Preamble makes it clear that the source of all authority are the people of India (the opening and closing words-"We, the people of India.... adopt, enact and give to ourselves this constitution"). *Thirdly*, the Preamble declares the great rights and freedom which the people of India intended to secure to all citizens and the basic type of government and polity which was to be established.

FUNDAMENTAL RIGHTS

The Constitution of India guarantees to the citzens of India certain rights, known as Fundamental or Constitutional Rights. These rights, contained in Part III of the Constitution, are concerned with the freedom of the 'social individual' and are essential to the development of human personality and human happiness. The recognition, promotion and protection of these rights are the main justification for the existence of a State and "every State is known by the rights it maintains". The concept of rights has, however, varied widely from generation to generation and was evolved to a large extent as an instrument of revolt against tyrannical and all-powerful governments.

The individual has been seeking emancipation since ages from the thraldom of State. The *Magna Carta*, the Petition of Rights in England, the Bill of Rights in France, and the Charter of Demands in America, are the distinct milestones in this direction. The political philosophers Rosseau, Locke, Montesquieu and Blackstone lent a new fervour, tone and temper to this regeneration movement.

The fundamental question here is : How can the individual be protected in the exercise of his rights and liberties against the State ? This question should not arise in a real democracy. However, even in a democracy, various methods have been devised to safeguard the rights of the citizens. The most effective way is 'the rule of law' and not that of individuals, however wise or good. In addition, some Constitutions provide certain fundamental rights and liberties which the individual cannot be deprived of by the Executive, the Government or the Legislature. It is fact a that even a respresentative government is not immune from the vice of interfering with the liberty of the individual. If this is for nothing else, it may be for doing things quickly and not waiting for the lengthy process of the law.

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'Rights of man,' therefore, formed the natural weapon of those struggling to limit the powers of governments during the sixteenth, seventeenth and eighteenth centuries. In that age, the rights demanded were mainly civil and political rights. In the modern age, greater emphasis is being laid on economic and social rights and the expansion of State activities, and there is also a growing realization about the inter-dependence of economic rights and civil liberties. It is in recognition of this principle that the universal Declaration of Human Rights adopted by the United Nations in 1948 comprised not only the traditional, civil, and political rights but also economic and social rights. India has adopted most of the principles of the Declaration as its Constitutional obligations. Speaking generally, the traditional civil and political rights have been enshrined in our Constitution as Fundamental Rights, while economic and social rights have been set forth as Directive Principles. Under the twin heads of Fundamental Rights and Directive Principles, our Constitution sets out most elaborate declarartion of human rights yet the framed by any State.

In conformity with the Preamble to the Constitution, our Constituent Assembly formulated tthe following Fundamental Rights:

1. Right to equality (Articles 14 to 18);
2. Right to freedom of expression and assembly (Articles 19 to 22);
3. Right against exploitation (Articles 23 and 24);
4. Right to freedom of religion (Articles 25 to 28)
5. Cultural and educational rights (Articles 29 and 30);
6. Right to property (Article 31). Article 31 was repealed by the Constitution (Forty-fourth Amendment) Act, 1978 with effect from 20th June, 1979;
7. Right to constitutional remedies in Law Courts (Articles 32 to 35).

These rights are contained in Chapter III of the Constitution.

The Articles in part III of the Constitution make a distinction between a 'citizen' and a 'person'. Certain Fundamental Rights are conferred only on *citizens*,*e.g.*,rights conferred by Articles 15, 16 19 and 30. Certain Fundamental Rights are conferred on any person, whether citizen or not, *e.g.*, rights conferred by Articles 14, 20, 21, 23, 25, 27 and 28. The rights guaranteed by Articles 15, 17,18,20 and 24 impose an absolute limitation on the powers of the Legislature to regulate the excercise of such rights.

A fundamental right, as defined in the Constitution, differs from a non-fundamental right in one vital aspect; a fundamental right (subject to the qualifications defined in the Constitution itself) is invidable, where as a non-fundamental right possesses no such characteristic. It is inviable, in the sense that no law, ordinance, custom, usage or administrative order can abridge or take away a fundamental right. A law which violates any of the fundamental Rights is void. The fundamental Rights are binding on the Legislature as well as the Executive.

In order to make the Fundamental Rights more effective, Article 12 defines 'the State' and Article 13(3) *(a) defines the law very widely [Ram Krishna Dalmia v. S.R. Tendolkar*, (1958) S.C.538].

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The Fundamental Rights are the natural consequence of the Preamble to the Constitution. They are inalienable and are justiciable even against the Government through the Judiciary . Article 13 (1) clearly lays down in this regard :

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part *(i.e.,* Part III), shall, to the extent of such inconsistency, be void."

Further Article 13 (2) says that "the State shall not make any law which takes away or abridges the rights conferred by this Part *(i.e.,*Part III which deals with Fundamental Rights) and any law made in contravention of this Clause shall, to the extent of the contravention, be void."

Definition of State (Article 12)

Before detailed discussion of these Fundamental Rights is taken up, it is important to know what 'State' means in the context of Fundamental Rights. In Part III (which deals with Fundamental Rights), unless the context otherwise requires, 'State' includes :

(1) The Government and Parliament of India ;

(2) The Government and the Legislature of each of the States ; and

(3) All local or other authorities within the territory of India or under the control of the Government of India. The expression 'local authorities' relates to :

(a) Muncipal Committees or Corporations ;

(b) District Boards ;

(c) Panchayats ;

(d) Improvement Trusts; and

(e) Port Trusts [*Electricity Board, Rajasthan* v. *Mohan Lal*, A.I.R. (1967) S.C. 1857].

Other authorities. The expression 'other authorities' includes all authorities created by the Constitution or some Statute and on whom powers are conferred by law,*e.g.*, a University [*University of Madras* v. *Shanta Bai*, A.I.R. (1954) Mad.67].

Tests to determine whether a corportation or a body is a 'State'. The Supreme Court has laid down a number of tests to see whether a corporation or a body is 'State' for the purposes of Article 12. In *Ajay Hasia* v. *Khalid Mujib*, A.I.R. (1981) S.C. 487, the Court laid down the following tests :

(a) If the entire share capital of the corporation is held by the Government, it would indicate that the corporation is an instrumentality or authority of the Government.

(b) Where the financial assistance of the State is to the extent of meeting almost the entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Government character.

(c) Where the corporation enjoys monopoly status which is State-conferred or State-protected, or where there is existence of deep and pervasive State control, these afford an indication that the corporation is a State agency or instrumentality.

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(d) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(e) Where the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying a corporation as an agency or instrumentality of State.

(f) Where a department of Government is transferred to a corporation, it would be a strong factor in supporting the inference of the corporation being an instrumentality or agency of the Government. It does not, however, necessarily follow that if a corporation, statutory or otherwise, is held to be an 'authority', its employees would become Government employees, *e.g.*, for purposes of Article 311 [*Sabhajit Tewari* v. *Union of India*, (1975)1 S.C.C.485].

These tests have also been followed in *Manmohan Singh* v. *Commissioner, Union Territory, Chandigarh*, A.I.R. (1985) S.C. 364 and in *Vibhu Kapoor* v. *I.S.C. Examination*, A.I.R. (1985) Del. 142].

Although the above-mentioned tests are not conclusive or clinching yet they go a long way in helping to decide whether a body falls under the category of 'State'. There is a positive development to include as many bodies in the category of 'State' as possible so as to protect rights of people. In *M.C. Mehta* v. *Union of India*, (1987) 1 S.C.C. 395, Bhagwati C.J. has advanced strong arguments for including even non-government companies within the meaning of State if for reasons of state control and regulation and the public function they are performing, they satisfy the test of being an instrumentality or agency of the Government.

Is Judiciary State ? In Article 12, the Judiciary, although an organ of the State (like the Legislature and the Executive) is not specifically mentioned. The definition of the 'State' in Article 12, however, is an inclusive definition which does not exclude the Judiciary. It should thus be included within the expression 'other authorities' since Courts are set up by Statute and excercise powers conferred by law. When a Court in the exercise of its statutory rule-making powers under Articles 142 and 145, makes rules which contravence the Fundamental Rights of citizens, it acts in the capacity of State and the rules could be held to the *ultra vires* and appropriate remedy under Articles 32 and 226 given [*Prem Chand Garg* v. *Excise Commissioner*, A.I.R. (1963) S.C. 996]. Likewise, the Chief Justice in excercising the power of appointment of officers shall be amenable to the writ jurisdiction, if appointments are made in violation of the equality clause of the Constitution [*Naresh S. Mirajkar* v. *State of Maharashtra*, A.I.R. (1967) S.C 1]. But a writ cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be attributed to violate the Fundamental Rights secured by the Constitution.

Laws inconsistent with or in derogation of the Fundamental Rights (Article 13)

Article 13, together with Articles 32 and 226, highlights one of the most important aspects of Fundamental Rights, *i.e.*, justiciability of Fundamental Rights. It is a key provision which makes Fundamental Rights justicable. It confers power and imposes an obligation on the Courts to declare a law void if it is inconsistent with any Fundamental Right.

Article 372 provides that all laws in force immediately preceding the commencement of the Constitution shall continue to be in force until amended or repealed by a competent Legislature.

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Article 13 (1) deals with pre-Constitution laws or laws as they existed before the Constitution. Any such law which is inconsistent with the Fundamental Rights shall, to the extent of such inconsistency, be void, from the date of commencement of the Constitution. However, such invalidity has to be pronounced by a competent Court of law [*Mohd. Ishaq* v. *State*, A.I.R. (1961) All. 552].

Rules of interpretation of Article 13 (1)—*Pre-Constitution laws*. The following rules of interpretation shall be applied in interpretation of Article 13 (1) :

1. *No retrospective effect*. The provisions of the Constitution relating to the Fundamental Rights have no retrospective effect. All inconsistent existing (pre-Constitution) laws therefore became void only from the commencement of the Constitution. In *Keshavan Madhava Menon* v. *State of Bombay*, A.I.R. (1951) S.C. 128, the Court held that an act done before the commencement of the Constitution, if valid according to the law then in force, cannot be questioned, even though after the commencement of the Constitution, under the terms of the Constitution, that act is invalid.

2. *The rule of severability*. It is not the whole (pre-Constitution) Act that should be held inoperative but only such provisions of it as are violative of the Fundamental Rights. The power of the Court to strike out invalid provisions of an Act must not be excercised beyond the necessity of the case. Sometimes valid and invalid portions of the Act are so closely mixed up that they cannot be separated from each other. In such cases, if the Act is to be held invalid the invalidity of the portion must result in invalidity of the entire Act, as the valid portion cannot survive independently [*Deepak Sibal* v. *Punjab University*, A.I.R. (1989) S.C. 908.].

3. *The doctrine of eclipse*. An existing law inconsistent with a Fundamental Right, even though it becomes inoperative from the date of the commencement of the Constitution, is not dead altogether. It is overshadowed by the Fundamental Rights and remains dormant, but is not dead. The law as it stands is still valid against persons who do not have such Fundamental Rights and the law can also be revivified (revived) if the Fundamental Right itself is removed by an amendment to the Constitution [*Bhikaji Narain Dhakras* v. *State of M.P.*, (1955) S.C. 781].

Post-Constitution laws. Article 13 (2) relates to laws made after the commencement of the Constitution. The State is prohibited from making any law which takes away or abridges any of the rights conferred by Part III. A law made in contravention of Article 13 (2) shall, to the extent of the contravention, be void. The concept of "voidness" is also considered by the Courts as "relatively void" because a subsequent amendment of the statute or a constitutional amendment can remove the unconstitutionality of the Act [*Jagannath* v. *A.O., Land Reform*, (1971) 2 S.C.C. 893].

Definition of 'law' and 'laws in force'. Article 13 (3) defines the terms 'law' and 'laws in force'. The definition enumerates some of the normal forms in which the law generally finds its expression. Broadly speaking, 'law' is categorised in two forms, *i.e.*, statutory laws (either made directly by the Legislature or by the other subordinate authorities under the delegated law-making powers as, for example, rules, orders, regulations, notifications and bye-laws) and customs or usages. In *Dashrath Rama Rao* v. *State of A.P.*, A.I.R. (1961) S.C. 564 it was held that "even though there was a custom which

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has been recognised by law, that custom must yield before a Fundamental Right".

In *Golaknath* v. *State*, A.I.R. (1967) S.C. 1643, the Supreme Court had held that the word 'law' in Article 13 (2) included amendments to the Constitution and consequently if an amending law abridged or took away a Fundamental Right guranteed by Part III of the Constitution, the Amending Act itself would be void and *ultra vires*. Consequently Clause (4) was included in Article 13 in 1971 by the Twenty-fourth amendment to the Constitution. It takes constitutional amendments out of the purview of Article 13. Subsequently in *Kesavananda Bharati* v. *State of Kerala*, (1973) S.C.C. 225, the Supreme Court overruled the *Golaknath* Case, and it was unanimously held that the amendment inserting Clause (4) was valid although by a majority it provided a rider that the provisions affecting the 'basic structure' of the Constitution could not be amended. The expression 'basic structure' is yet to be precisely defined.

Doctrine of waiver. Can a person waive any of his Fundamental Rights ? In *Behram* v. *State of Bombay*, A.I.R. (1955) S.C. 123 Venkatarama Aiyar J. divided the Fundamental Rights in two broad categories : rights conferring a benefit on the individuals, and those conferring a benefit on the general public. According to him a law would not be a nullity but merely unenforceable if it was repugnant to a Fundamental Right in the former category, and that the affected individual could waive such an unconstitutionality, in which case the law would apply to him. But the majority repudiated this view and held that none of the Fundamental Rights can be waived by a person. The Fundamental Rights are mandatory on the State and a citizen cannot by his act or conduct relieve the State of the solemn obligation imposed on it. This view has been reiterated by the Supreme Court in *Basheshar Nath* v. *Income-tax Commr.*, A.I.R. (1959) S.C. 179.

Now we consider the various Fundamental Rights.

1. RIGHT TO EQUALITY (Articles 14 to 18)

All persons are equal before law is the basis of every civilised Constitution. Equality before law is a negative concept ; equal protection of laws is a positive one. The former declares that everyone is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land ; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure, it is well nigh impossible to make laws suitable in their application to all the persons alike. So, a reasonable classification is not only permitted but is necessary if society should progress. But such a classification cannot be arbitrary. It must be based upon differences pertinent to the subject in respect of and purpose for which it is made [*State of U.P.* v. *Deoman Upadhyaya*, (1961) 1 S.C.R. 14].

The right to equality has been guaranteed by the Constitution under Articles 14 to 18.

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(1) Equality before law (Article 14)

Article 14 of the Constitution provides : "The State shall not deny to any person equality before law or the equal protection of the laws within the territory of India."

The expressions "equality before law" and "equal protection of the laws" mean different things. The former is taken from the English Common Law. It is a *negative* concept. It implies the absence of any special privilege in favour of any individual whatever be his rank or status, and the equal subjection of all classes to the ordinary law. This means no man, be he the Prime Minister or an ordinary peasant, is above law. "Equal protection of the laws" is a *positive* concept and it implies equality of treatment in equal circumstances. in other words, it means "that among equals the law should be treated equal and equally administered, that like should be treated alike..." and among unequals same laws should not be applicable.

Article 14 applies to any person and is not limited to citizens alone. a corporation, which is a juristic person, will be also entitled to the benefit of this article [*Chiranjit Lal Choudhry* v. *Union of India*, A.I.R. (1951) S.C. 41].

Principle of reasonable classification. In order that "right to equal treatment" in similar circumstances should make sense, the law shall have to make a classification between persons who are equally situated from those who are not so situated. Thus if there is a reasonable basis for classification, the Legislature would be entitled to treat different classes differently. Thus, it may—

(i) exempt certain classes of property from taxation at all, such as charities, libraries and the like ;

(ii) impose different specific taxes upon different trades and professions ;

(iii) tax real and personal property in different manner and so on.

What is prohibited under Article 14 is 'discriminatory' legislation and not special legislation based on reasonable classification. Classification is inherent in legislation based on reasonable classification and the Courts recognise in the Legislature some degree of elasticity in matters of making a classification between persons, objects and transactions. The classification may be based on—

(a) business, geographical or territorial differences ;

(b) difference in time ;

(c) nature of persons ; and

(d) object of the law.

Tests of valid classification. The classification must be reasonable and rational and not arbitrary and must pass the following two tests :

First, any classification must be founded on intelligible differentia which distinguishes persons, transactions or things grouped together from others left out of the group.

Secondly, the differentia must have a rational relation to the object sought to be achieved by an Act ; there must be a nexus between the basis of classification and the object of the Act.

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The object of classification should also be lawful. Classifications made in the utmost good faith, classifications that are scientific and rational, that will have direct and reasonable relation sought to be achieved can yet be bad because despite all that the object itself cannot be allowed on the ground that it offends Article 14. In such a case, the object itself must be struck down and not the mere classification which, after all, is only a means of attaining the desired end [*Nagpur Improvement Trust* v. *Vithal Rao*, (1973)1S.C.C.500].

Rules with respect to classification, In *Ram Krishna Dalmia* v. *Justice Tendolkar*, A.I.R .(1958) S.C. 538, the Supreme Court reviewed the various decisions and laid down the following rules with respect to permissible classification :

(a) A law may be constitutional even though it applies to a single person, if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treateed as a class by himself.

(b) The Legislature is free to recognise the degree of harm and may confine its restrictions to those cases where the need is deemed to be clearest.

(c) It must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.

(d) The presumption is that a law is constitutional and the burden is upon him who attacks that law to prove that there has been a clear violation of constitutional principles. A person who pleads violation of Article 14 must show that not only has he been treated differently from others but he has been so treated from persons similarly circumstanced without any reasonable basis and such differential treatment has been unjustifiably made.

(e) In order to uphold the aforementioned presumption of constitutionality, the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every State of facts which can be conceived as existing at the time of legislation.

(f) A classification need not always be scientifically perfect or logically complete.

(g) While good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the Court on which the classification may reasonably be regarded as based, the presumption of the constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

(2) Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (Article 15)

Article 15 prohibits discrimination against citizens on certain specific grounds and is not general in nature like Article 14 which guarantees 'right to equality in general' to any person. According to it, the State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth or any of them. Article 15 (1) guarantees the right of a citizen

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against the State only. Further, no citizen shall on grounds *only* of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment ; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public [Article 15 (2)]. Article 15 (2) guarantees the right of a citizen against private persons.

The significance of the world 'only' as used in Clauses (1) and (2) of Article 15 is that if there are any other grounds or considerations for the differential treatment besides those prohibited by Article 15, the discrimination will not be unconstitutional [*Yusuf* v. *State of Bombay*, A.I.R. (1954) S.C. 321], *e.g.*, employment of only women as nurses in a hospital or restriction on the emplyment of women in smelting department of a steel mill.

Exceptions. The rights guaranteed in Clauses (1) and (2) of Article 15 are subject to the following exceptions :

(a) The State can make any special provisions for women and children [Article 15 (3)] like reservation of seats in buses and railways and restricted working hours for women and children in factories. The language of the exception is in absolute terms and does not restrict in any way the nature or ambit of special provisions which the State may make in favour of women or children.

(b) The State can make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes [Article 15 (4)], *e.g.*, reservation of seats for the members of the backward classes or the scheduled castes or tribes or granting them scholarships or fee concessions in public educational institutions.

It is important to note that Article 15 (4) is only an enabling provision. It does not impose an obligation on the State to make any special provisions, but leaves it to the discretion of the appropriate Government to take suitable action, if necessary [*Anil Kapoor* v. *Dean, Government Medical College, Nagpur*, A.I.R. (1985) Bom. 153]. It is also interesting to note that the backwardness referred to in Article 15 (4) must be both social and educational. Further, reservations can be made for the Scheduled Castes and the Scheduled Tribes which shows that they are treated as a category separate and independent from socially and educationally backward group. The principle underlying Article 15 (4) is that a preferential treatment can be given because the socially and educationally backward classes need it, so that in course of time they stand in equal position with the more advanced sections of the society. Special provisions in favour of backward classes can be made by an executive order also and leglislation for that purpose is not necessary. But the reservations should be less than 50 per cent and the actual percentage must depend upon the relevant prevailing circumstances in each case [*M.R. Balaji* v. *State of Mysore*, A.I.R. (1963) S.C. 648].

However, the provision of Article 15 (4) does not contemplate to reserve all the seats or the majority of the seats in an educational institution at the

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cost of meritorious candidates in the society [*Deepak Sibal* v. *Punjab University*, A.I.R. (1989) S.C. 83].

(3) Equality of opportunity in matters of public employment (Article 16)

Article 16 is an instance of the application of the general rule of equality before law as laid down in Article 14 and the prohibition of discrimination guaranteed by Article 15(1) with speical reference to opportunity for employment or appointment to any office.

Article 16 guarantees equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State [Article 16 (1)].

Further no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State [Article 16 (2)].

The above two Clauses [*i.e.*, Article 16 (1) and (2)]apply only in respect of employments or offices which are held or are under the control of the State. The Clauses guarantee equality of opportunity only. Hence, it does not prevent the State from laying down the required qualifications for recruitment to Government service. Selection from numerous candidates is also allowed provided the selection is not arbitrary or unjustified. The expression "matters relating to employment or appointment" includes all matters in relation to employment both prior and subsequent to the employment which are incidental to it. The guarantee in Article 16(1) and (2) therefore covers—

(a) initial appointments,

(b) promotions,

(c) termination of employment, and

(d) matters relating to salary, periodical increments, leave, gratuity, pension, etc.

Exceptions. Clauses (3) and (5) of Article 16 provide for exceptions to the rule to equality. These exceptions are as follows :

(i) Parliament may make any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union Territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment [Article 16 (3)].

(ii) A law shall not be invalid if it provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination [Article 16 (5)]. Thus a law shall not be invalid if it provides that the priest of Lakshmi Narayan temple shall be only a Hindu or that Imam of Jama Masjid shall only be a Mohammedan.

Article 16 (4) makes a provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State is not adequately represented in the services under the State.

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Earlier the view was that this Clause is also an exception to Article 16 (1) and (2). But now the Supreme Court in *Indra Sawhney* v. *Union of India*, A.I.R. (1993) S.C. 417 (more popularly known as the Mandal Commission case) has settled the position that Article 16 (4) is not an exception of Article 16 (1) or (2), rather it is an emphatic application of Article 16 (1). The Court further held that reservation of appointments or posts under Article 16 (4) is confined to initial appointment only and cannot extend to providing reservation in the matter of promotion. The Court also excluded some services from the rules of reservation, some of them being defence (technical) services, technical posts in research and development, teaching posts of professors and above, posts in superspecialities in medicine, engineering, etc. The list is merely illustrative. Further the Court also sought to exclude the "creamy layer" of the identified backward classes of citizens from the benefits of reservation.

(4) Abolition of untouchability (Article17)

Article 17 of the Constitution provides : "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law. Therefore Article 17 enacts two declarations :

First, it announces that"untouchability" is abolished and its practice in any form is forbidden, and

Secondly, it declares that the enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

Consequently Parliament, in exercise of its powers, passed the Untouchability (Offences) Act, 1955 providing for punishment for the offfence of untouchability. In 1976, the Act was amended and renamed as the Protection of Civil Rights Act, 1955. In the amended Act "Civil Rights" has been defined as any right accruing to a person by reason of abolition of untouchability under Article 17 of the Constitution. Under the amended Act, all offences under the Act are to be treated as non-compoundable and offences punishable upto 3 months are to be tried summarily. Further, punishment of many offences has been enhanced and preaching of untouchability or its justification has been made an offence. The Act also envisages a machinery for better administration and enforcement of its provisions.

(5) Abolition of titles (Article 18)

Article 18 of the Constitution provides :

"(1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument or office of any kind from or under any foreign State."

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The institution of titles was used by the British Government for imperialistic purposes and for corrupting public life. The titles were conferred upon people who showed special allegiance to the British Government which thus created a class of so-called 'superior' persons. Article 18 now prohibits the State from conferring any title at all.

It may be noted that the State is not debarred from awarding military or academic distinctions and these may be used as titles. Further the State may also confer any distinction or award for social service but this cannot be used as a title, *i.e.*, as an appendage to one's name. Thus the award of Bharat Ratna or Padma Vibhushan, or Padma Bhushan or Padma Shri cannot be used by the recipient as title, but there is no sanction, either in the Constitution or in any existing law, against a recipient of any such decoration appending it to his name, and thus using it as title.

It is however important to note that Article 18 does not, like Articles 17 and 23, make the breach of any obligation an offence punishable in accordance with law. Therefore, it is a mere prescription or prohibition observable and enforceable by the persons and bodies concerned merely as a matter of political obligation to the democratic state under this Article and not as an obligation entailing penal consequences for which punishment can be prescribed under Article 35.

The purpose of Articles 17 and 18 is the furtherance of *social equality*.

2. RIGHT TO FREEDOM (Articles 19 to 22)

In order to promote the ideal of liberty as laid down in the Preamble, certain positive rights have been conferred by the Constitution. These rights are contained in Articles 19 to 22.

(1) Six (formerly seven) freedoms, *i.e.*, rights regarding freedom of speech, etc. (Article 19)

Article 19 (1) guarantees to every citizen six (formerly these were seven) fundamental freedoms. According to it :-

"All citizens shall have the right —

(a) to freedom of speech and expression ;

(b) to assemble peaceably and without arms ;

(c) to form associations or unions ;

(d) to move freely throughout the territory of India ;

(e) to reside and settle in any part of the territory of India ; and

(f) .....

(g) to practise any profession, or to carry on any occupation, trade or business".

Clause *(f)* of Article 19 which read "to acquire, hold and dispose of property" has been abolished by the Constitution (Forty-fourth Amendment) Act, 1978.

The freedoms guaranteed by Article 19 (1) are not absolute. These are fettered by the restrictive provisions contained in Clauses (2) to (6) of Article 19. The object of these restrictions is to reconcile the rights of the citizens as conferred by Article 19 (1) with the power of the State to enact suitable

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legislation for ensuring the welfare of the community [*A.K. Gopalan* v. *State of Madras*, A.I.R. (1950) S.C. 27].

Reasonable restrictions. Clauses (2) to (6) of Article 19 impose, in the larger interests of the community, some restrictions on the six fundamental freedoms guaranteed by Clause (1) of Article 19. The word 'restriction' as used in Clauses (2) to (6) has been qualified by the word 'reasonable' and the Courts are competent to adjudicate the reasonableness or otherwise of a law which imposes restrictions on these freedoms.

As the term "reasonable restrictions" is nowhere defined in the Constitution, its meaning would vary according to which of the six rights guaranteed under Clause (1) is being restricted by the impugned law. The standard to be laid down is an elastic one ; it varies with time, space and condition and from case to case [*Olga Tellis* v. *Bombay Municipal Corporation*, (1985) 3 S.C.C. 545].

By conferring a power on the State to impose by its laws reasonable restrictions on the six freedoms, our Constitution has attempted "to strike a balance between individual liberty and social control". [*A.K. Gopalan* v. *State of Madras*, A.I.R. (1950) S.C.27]. Hence any law restricting the exercise of any of the freedoms guaranteed by Article 19 (1) to be constitutionally valid, must pass the following two tests, namely :

(i) the restriction must be for the particular purpose mentioned in the Clause permitting the imposition of the restriction on that particular right ; and

(ii) the restriction must be a reasonable restriction.

It is important to emphasise that the requirement of reasonableness of restrictions acts as a check on the Legislature and enlarges the scope of judicial review. The test of reasonableness of restrictions imposed by the State is that they should not be arbitrary, excessive or beyond what is required in the interest of general public. The reasonableness shall be tested on the touchstone of both substantive and procedural aspects.

The various restrictions as contained in Clauses (2) to (6) of Article 19 are discussed below:

(1) *Restrictions on freedom of speech and expression.* Article 19 (1) *(a)* secures to every citizen the freedom of speech and expression. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, pictures or any other mode. Unlike the American Constitution, Article 19 (1) *(a)* does not expressly mention the liberty of the press, *i.e.*, freedom to print and to publish what one pleases without previous permission. But it is settled law that right to freedom of speech and expression in Article 19 (1) *(a)* includes the liberty of the press [*Sakal Papers (P.) Ltd.* v. *Union of India*, A.I.R. (1962) S.C. 305 ; *Bennett Coleman Co.* v. *Union of India*, (1972) 2 S.C.C.788].

Article 19 (2) provides that the State may impose by law reasonable restrictions on the freedom of speech and expression :

(i) in the interests of *(a)* the sovereignty and integrity of India, *(b)* the security of the State, *(c)* friendly relations with foreign States, *(d)* public sector, decency or morality, or

(ii) in relation to *(a)* contempt of Court, *(b)* defamation, or *(c)* incitement to an offence.

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Balance must however be maintained between freedom of speech and expression and public decency and morality but where the latter is transgressed, the former must give way.

(2) *Restrictions on freedom of assembly.* Article 19 (1) *(b)* guarantees to all citizens of India the right of assembly which includes the right to hold meetings and to take out processions. The freedom of assembly is subject to the qualification that the assembly is peaceable and without arms and subject to such reasonable restrictions as may be imposed by the State in the interests of —

(a) the sovereignty of India, or

(b) public order [Article 19 (3)] without which the liberty itself would be lost in case of unrestrained abuses.

(3) *Restrictions of freedom to form asociations or unions.* All citizens have the right to form associations or unions [Article 19 (1) *(c)*]. The right to form associations implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interest. The right to form an association also includes the right to continue it. This right is however subject to reasonable restrictions which the State may impose in the interests of —

(a) the sovereignty and integrity of India, or

(b) public order or morality [Article 19 (4)].

(4) *Restrictions on freedom to move freely and to reside and settle in any part of India.* Every citizen has the right —

(a) to move freely throughout the territory of India [Article 19(1) *(d)*];

(b) to reside and settle in any part of the territory of India [Article 19 (1) *(e)*].

The 'right to move' means the right of locomotion and 'freely' connotes that the freedom to move is without any restriction and is absolute, *i.e.*, to move wherever one likes, whenever one likes, and however one likes within India subject to any valid law enacted under Article 19(5) [*Kharak Singh* v. *State of U.P.*, A.I.R. (1963) S.C. 1295]. The purpose of both these Clauses, *i.e.*, Clauses 19 (1) *(d)* and *(e)*, is to remove internal barriers within the territory of India so as to enable every citizen to travel freely and settle down in any part of a State or Union Territory.

The above rights are however subject to reasonable restrictions which may be imposed by the State —

(i) in the interests of the general public ; or

(ii) for the protection of the interests of any Scheduled Tribe [Article 19 (5)].

(5) *Restrictions on freedom of profession, trade or business.* The Constitution guarantees to every citizen the right to practise any profession, or to carry on any occupation, trade or business [Article 19 (1) *(g)*]. The right to carry on a business would include the right to close down or relinquish or sell the business. This is, however, subject to reasonable restrictions which the State may impose —

(a) in the interests of the general public ; and

(b) subject to any law laying down —

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(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise [Article 19 (6)].

By imposing the above restrictions, the competing interests of individual liberty and of public welfare have been sought to be reconciled. In *A.K.Gopalan* v. *State of Madras*, A.I.R. (1950) S.C.27, Mukherjea J. rightly observed :

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights....are subject to such reasonable conditions as may be deemed by the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. The question, therefore, arises in each case of *adjusting the conflicting interests* of the individual and of the society...Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to follow any trade, occupation or calling at his pleasure, and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is *to strike a balance between individual liberty and social security*. Article 19 of the Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality."

In *State of M.P.* v. *Nandlal*, A.I.R. (1987) S.C.251, the Supreme Court held that there is no fundamental right in a citizen to carry on trade or business in liquor. The State under its regulatory power has the power to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession. No one can claim against the State the right to carry on trade or business in liquor. But when the State decides to grant such right, the State cannot escape the rigour of Article 14.

(2) Protection in respect of conviction for offences (Article 20)

Article 20 guarantees to all persons, whether citizens or non-citizens, protection against conviction for offences by prohibiting —

(a) *ex post facto* legislation ;

(b) prosecution and punishment for the same offence more than once ; and

(c) compulsion to give self-incriminating evidence.

(a) Protection against ex post facto legislation. The Constitution protects every person against *ex post facto* legislation as regards criminal offences. If an act is not an offence according to law at the time of the commission of the act charged as an offence, no subsequent law can make it so. An 'offence' means an act or omission made punishable by any law for the time being in force [Sec.3 (38) of the General Clauses Act, 1897]. The prohibition under Article 20 (1) is not confined to the passing of *ex post facto* laws but extends also to the conviction or the sentence under such laws. Therefore, no person can be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence [Article 20 (1)]. It is important to note that the second part of Article 20 (1) (dealing with

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penalty for offence) as also the first part (dealing with conviction for offence) applies only to cases of retrospective increase of penalty for an offence and has no reference to the retrospective increase of civil liability. Therefore an increase in any fine or charge for an act which is not an offence under the law is not protected by this Article [*Jawala Ram* v. *State of Pepsu*, A.I.R. (1962) S.C. 1246]. The protection against *ex post facto* legislation is also not available with respect to procedural law. Thus, no one has a vested right in procedure.

(b) Protection against double jeopardy. According to Article 20 (2), no person can be prosecuted and punished for the same offence more than once. The Constitution guarantees protection against 'double jeopardy' (an expression used in American Law). This means if a person has been prosecuted and punished for an offence, he cannot be prosecuted and punished for the same offence again in a subsequent proceeding. However, there is no Constitutional bar to a second prosecution and punishment for the same offence, if there was no punishment for the offence as a result of the prosecution earlier [*Kalawati* v. *H.P. State*, A.I.R (1953) S.C.131].

(c) Protection against self-incrimination. Article 20 (3) provides protection to every person accused of any offence against self-incrimination. It runs thus : "No person accused of any offence shall be compelled to be a witness against himself."

A person can claim protection under Article 20 (3) if the following two conditions are satisfied :

(i) he is accused of an offence ; and

(ii) he is being compelled to be a witness against himself. If a person, who is not accused of any offence, is compelled to give evidence, and the evidence ultimately leads to an accusation against him, the provisions of Article 20 (3) are not attracted.

(3) Protection of life and personal liberty (Article 21)

Article 21 guarantees to every person right to 'life' and 'personal liberty'. It runs thus : "No person shall be deprived of his life or personal liberty except according to procedure established by law."

This Article is based on one of the famous clauses of Magna Carta which runs thus : "No man shall be taken, imprisoned, or destroyed save....by law of the land."

This Article does not grant absolute right as regards 'life' or 'personal liberty'. It is a qualified right—a right which may be lost according to procedure established by law [*A.K.Gopalan* v. *State of Madras*, A.I.R. (1950) S.C.27].

Article 21 provides protection against arbitrary or illegal action of the State or any of its agents, *i.e.*, against the executive invasion of 'life' or 'personal liberty' of any individual unless there is some law to support the action of the State and the procedures prescribed by such law have been strictly and scrupulously observed. The Article in no way puts any limitation upon the powers of the Legislature.

Personal liberty. The expression 'liberty' in the 5th and 14th amendments to the U.S.Constitution has been given a very wide meaning. The expression 'personal liberty' was given a restricted interpretation in *A.K.Gopalan's* case, as liberty relating to or concerning the person or body of an individual only.

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But this view was not accepted by the Supreme Court in later cases. In *Kharak Singh* v. *State of U.P.*, A.I.R. (1963) S.C.1295, the Supreme Court held that the expression 'personal liberty' is not limited to bodily restraint or to confinement in prison only.

In *Satwant Singh Sawhny* v. *A.P.O. New Delhi*, A.I.R. (1967) S.C. 1836, it was held that right to travel abroad is included within the expression 'personal liberty' and, therefore, no person can be deprived of his right to travel except according to the procedure established by law. Since a passport is essential for the enjoyment of that right, the denial of a passport amounts to deprivation of personal liberty, if the denial is not supported by a procedure established by law. This point was reiterated in *Maneka Gandhi* v. *Union of India*, A.I.R. (1978) S.C. 597, where it was further held that the Fundamental Rights conferred by Part III of the Constitution are not distinct and mutually exclusive. Thus, a law depriving a person of personal liberty and prescribing procedure for that purpose within the meaning of Article 21 has to stand the test of the one or more of the Fundamental Rights conferred by Articles 14 and 19.

Life. The term 'life' as used in Article 21 means not merely the right to the continuance of a person's animate existence, but a right to the possession of each of his organs—his arms, legs, etc. [*Kharak Singh* v. *State of U.P.*, A.I.R. (1963) S.C 1295].

Procedure established by law. 'Procedure established by law' has been compared to the American concept of 'due process of law' in many cases by many judges. The position, however, has been almost settled by Bhagwati, J. (as he then was) in *Maneka Gandhi* v. *Union of India*, A.I.R.(1978) S.C.597 as follows :

> "The principle of reasonableness, which is an essential element of equality or non-arbitrariness pervading Article 14, must also apply with equal force to the 'procedure' contemplated by Article 21, that is, the procedure must be 'right, just and fair' and not 'arbitrary, fanciful or oppressive'. In order that the 'procedure' is 'right, just and fair', it should conform to the principles of 'natural justice', that is, 'fair play in action."

After *Maneka Gandhi* case, a new era has emerged which has given rise to many new Fundamental Rights. All these rights although not enshrined in the Constitution specifically have found their roots in Article 21. Some of these rights are:

(a) Right to speedy criminal trial and more criminal Courts [*Hussainara Khatoon* v. *Home Secretary, Bihar* (No.1) A.I.R. (1979) S.C.1360].

(b) Right to bail [*Babu Singh* v. *State of U.P., A.I.R.* (1998) S.C. 527]

(c) Right to legal aid [*Hussainara Khatoon v. Home Secretary, Bihar* (No.3), A.I.R. (1979) S.C.1377 ; *M.H. Hoskot* v. *State of Maharashtra*, A.I.R. (1978) S.C. 1548].

(d) Right to human dignity [*Sunil Batra* v. *Delhi Administration*, A.I.R.(1978) S.C.1675 ; *Charles Sobhraj* v. *Supdtt., Central Jail, Tihar*, A.I.R.(1978) S.C.1514]

(e) Right of a prisoner not to be handcuffed except in very special circumstances [*Prem Shankar* v. *Delhi Administration*, A.I.R. (1980) S.C. 1535].

(f) Right against use of third degree methods by police [*Kishor Singh* v. *State of Rajasthan*, A.I.R. (1981) S.C. 625].

(g) Right of a detenue to have interview with his lawyer and family members [*Francis Corllie* v. *Union Territory of Delhi*, A.I.R. (1981) S.C.7461.

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(h) Right against cruel and unusual punishment [*Jagmohan Singh* v. *State of U.P.* A.I.R. (1973) S.C. 947 ; *Bachan singh* v. *State of Punjab*, A.I.R. (1980) S.C. 898].

(i) Right of release and rehabilitation of bonded labour [*Bandhua Mukti Morcha* v. *Union of India*, A.I.R. (1984) S.C. 802].

(j) Right to compensation for violation of Fundamental Rights [*Rudul Sah* v. *State of Bihar*, (1983) 4 S.C.C. 14] ; *Bhim Singh* v. *State of J. & K.* (1985) S.C.C. 177 ; *M.C. Mehta* v. *Union of India*, (1987) 1 S.C.C. 395].

(4) Protection against arrest and detention (Article 22)

The 'personal liberty' of an individual is guaranteed by the Constitution by —

(a) providing that no person shall be deprived of his personal liberty except according to procedure established by law (Article 21), and

(b) laying down certain specific safeguards against arbitrary arrest and detention (Article 22).

The safeguards against arbitrary arrest and detention as provided in Article 22 are as follows :

(1) A person who is arrested shall not be detained in custody without being informed, as soon as may be, of the grounds for such arrest.

(2) Such a person shall have the right to consult, and to be defended by, a legal practitioner of his choice [Article 22 (1)].

(3) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the Court of the Magistrate.

(4) Such a person shall not be detained in custody beyond the period of 24 hours without the authority of a Magistrate [Article 22 (2)].

These safeguards are, however, not available to —

(a) an alien enemy ; or

(b) any person who is arrested or detained under any law providing for preventive detention [Article 22 (3)].

Preventive detention. A person is said to be preventively detained where he is detained without having committed any offence but for reasons connected with —

(a) Defence, Foreign Affairs, or the security of India (Item 3 of List 1 of Schedule VII), or

(b) the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community (Item 3 of List III of Schedule VII).

The detention in case of preventive detention takes place on the apprehension that the person detained is going to do something wrong which comes within any of the grounds specified above.

Since 'preventive detention' is generally ordered for the maintenance of the public order, the expression has been distinguished from the expression

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maintenance of law and order. The former refers to grave public disorder, the latter to disorders of local significance. Speaking of 'preventive detention' the Supreme Court in *A.K. Gopalan* v. *State of Madras*, A.I.R. (1950) S.C. 27, remarked : "This sinister looking feature, so strangely out of place in a democratic constitution, which invests personal liberty with the sacrosanctity of a Fundamental Right, and so incompatible with the promises of its Preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare...."

Procedural safeguards for a person preventively detained. Article 22 (3) (b) of the Constitution provides for preventive detention. Clauses (4) to (7) of Article 22 lay down procedural safeguards for a person preventively detained. These safeguards are:

(1) No law providing for detention shall authorise the Government to detain a person for a period longer than 3 months except on the recommendation of an Advisory Board which reports before the expiration of the said period of 3 months that there is, in its opinion, sufficient cause for such detention. The Advisory Board shall consist of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court.

Further, nothing in Article 22 (4) shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under Article 22 (7) *(a)* and *(b)* [Article 22 (4)].

(2) When any person is preventively detained the authority making the order shall, as soon as may be,

(a) communicate to such person the grounds on which the order has been made, and

(b) afford him the earliest opportunity of making a representation against the order [Article 22 (5)].

(3) The authority making any such order for the preventive detention of a person shall not be bound to disclose facts which such authority considers to be against the public interest to disclose [Article 22 (6)].

(4) Parliament may by law prescribe —

(a) the circumstances under which and the class or classes of cases in which, a person may be detained for a period longer than 3 months under any law providing for preventive detention without obtaining opinion of an Advisory Board ;

(b) the maximum period for which any person may be detained ; and

(c) the procedure to be followed by an Advisory Board (Article 22 (7)].

3. RIGHT AGAINST EXPLOITATION (Articles 23 and 24)

Articles 23 and 24 guarantee certain rights to weaker sections of the society to prevent their exploitation by unscrupulous individuals or even by the State. These are in a way adjuncts to the guarantee of personal liberty (Article 21) and prohibition of discrimination (Article 15).

Article 23 imposes a complete ban on traffic in human beings and forced labour and Article 24 prohibits employment of children in factories, etc.

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(1) Prohibition of traffic in human beings and forced labour (Article 23)

Article 23 (1) provides : "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

Traffic in human beings means "to deal in men and women like goods", such as to sell or let or otherwise dispose of them. In includes not only slavery but also traffic in women or the crippled for immoral or other purposes [*Raj Bahadur* v *Legal Remembrancer*, A.I.R (1953) Cal. 523]. The passing of Suppression of Immoral Trafficking in Women and Girls Act (SITA), 1956 is one of the steps towards implementing the intention of this Article.

'Slavery' is not expressly mentioned in Article 23 but it is covered under this Article. Sec.370 of the Indian Penal Code, 1860 provides in this regard as follows : "Whoever imports, exports, removes, buys, sells or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment."

Begar is a system where a person is compelled to render involuntary and free service, *i.e.*, without wage [*Dubar* v. *Union of India*, A.I.R. (1952) Cal. 496]. But even if there is no question of payment of wages, a person cannot be compelled to work against his will.

Exception. Article 23 (2) provides for an exception. According to it, the State may impose compulsory service for public purposes. But in imposing such service, the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them. 'Public purpose' here has been used in a wide sense and will include all that will be calculated to promote the welfare of the people as envisaged in the Directive Principles of State Policy [*State of Bihar* v. *Kameshwar Singh*, A.I.R. (1952) S.C. 252].

(2) Prohibition of employment of children in factories (Article 24)

Article 24 provides : "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

The prohibition imposed by this Article is absolute. It admits of no exception under any circumstance. Obviously, the provision is in the interest of health and strength of young persons and is in keeping with the provisions of the directives in Article 39. However, this Fundamental Right will hardly be effective unless there is further legislation by Parliament by making it a penal offence to violate the prohibition imposed by the Article. The Employment of Children Act, 1938, the Factories Act, 1948, the Mines Act, 1952 and the Apprentices Act, 1961 are some of the important enactments in the statute book for protection of children.

4. RIGHT TO FREEDOM OF RELIGION (Articles 25 to 28)

The State in India has no religion. It is, in other words, a secular State, *i.e.*, a State which observes an attitude of neutrality and impartiality towards all religions. The State neither protects any religion nor does it discriminate against any religion or in other words the State is indifferent towards religion.

Articles 25 to 28 secure attitude of impartiality of the State towards all religions and thus make India a secular State in full measure. Our Constitu-

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tion does not define the word 'religion'. In *Commr. of H.R.E., Madras* v. *Sirur Muthu*, A.I.R. (1954) S.C. 282, the Supreme Court declared that religion is certainly a matter of faith with individuals or communities and it is not necessarily theistic. There are well-known religions in India like Buddhism and Jainism which do not believe in God. A religion undoubtedly has its basis in any system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, but it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and models of worship which are regarded as integral parts of religion and those forms and observances might extend even to matters of food and dress.

(1) Freedom of conscience and free profession, practice and propagation of religion (Article 25)

Article 25 guarantees to every person —

(a) freedom of conscience, and

(b) the right freely to profess, practise and propagate religion.

This freedom is subject to —

(a) public order, morality and health ; and

(b) other provisions in Part III (dealing with Fundamental Rights) [Article 25 (1)] ;

(c) any law regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

(d) any law providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus [Article 25(2)]. The reference to Hindus is construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions is construed accordingly (Explanation II to Article 25). Futher, Explanation I to Article 25 permits the wearing and carrying of kirpans by Sikhs as this is deemed to be included in the profession of the Sikh religion.

Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that real test of a true democracy is the ability of even an insignificant minority to find its identity under the the country's Constitution. This has to be borne in mind in interpreting Article 25. Expulsion of some children from school because of not joining in singing of national anthem was held to be violative of Articles 19 (1) *(a)* and 25 (1). The Court held that the children could not be denied their Fundamental Right under Article 25 (1) because of their consciously held religious belief, the children belonging to a religious sect—Jehovah's witnesses [*Bijoe Emmanuel* v. *State of Kerala*, A.I.R. (1987) S.C.748].

(2) Freedom to manage religious affairs (Article 26)

Article 26 guarantees to every religious denomination or any section thereof the right —

(a) to establish and maintain institutions for religious and charitable purposes ;

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(b) to manage its own affairs in matters of religion ;

(c) to own and acquire movable and immovable property ; and

(d) to administer such property in accordance with law.

These rights are subject to public order, morality and health.

The term 'denomination'[1] as used in Article 26 means "a collection of individuals classed together under the same name" or "a religious sect or body having a common faith and organisation and designated by a distinctive name" [*Commissioner, Hindu Religious Endowments* v. *Lakshmindra Teertha Swamiar*, A.I.R .(1954) S.C.282].

The extent of the freedom of religion guaranteed by Articles 25 and 26 has been made wider by judicial interpretation. These Articles guarantee the right of the individual to practise and propagate not only matters of faith and doctrine but also matters of practice and overt activities like rites, ceremonies in which the followers of a particular denomination engage themselves and such practices are an essential and integral part of their religion [*Venakataram* v. *State of Orissa*, A.I.R .(1958) S.C. 255]. However, these rights are subject to the power of the State to make laws for social welfare and therefore social welfare Acts to prevent bigamous marriages, and to prohibit evil practices such as 'sati' or the system of 'devdasi' could be justified under this clause. Therefore this right is limited only to affairs in matter of religion. Secular functions, though connected with religious institutions, are not immune from State interference. But to decide if a practice is religious or secular is not free from difficulty because sometimes they are inextricably mixed up.

(3) Freedom as to payment of taxes for promotion of any particular religion (Article 27)

According to Article 27, no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The restriction in this Article applies only to compulsion to pay any taxes the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The Supreme Court in *Commr., H.R.E.* v. *L.T. Swamiar*, A.I.R (1954) S.C. 282 has held that "What is forbidden by Article 27 is the specific appropriation of the proceeds of any tax in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. The reason being obvious that as ours is a secular State, and

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1. It is well known that the practice of setting up *maths* as centres of theological teaching was started by Shri Shankaracharya and was followed by various teachers since then. After Shankara came a galaxy of religious teachers and philosphers who founded the different sects and sub-sects of the Hindu religion that we find in India at the present day. Each one of such sects or sub-sects can certainly be called a religious denomination as it is designated by a distinctive name (in many cases it is name of the founder) and has common faith and common spiritual organisation. The followers of Ramanuja, who are known by the name of Shri Vaishnavas, undoubtedly constitute religious denomination ; and so do the followers of Madhvacharya and other religious teachers [*Per* Mukherjea J.in *Commissioner, Hindu Religious Endowments* v. *Lakshmindra Teertha Swamiar*, A.I.R. (1954) S.C. 282].

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their being freedom of religion guaranteed by the Constitution both to individuals and to groups, it is against the policy of the Constitution to pay, out of public funds any money for the promotion or maintenance of any particular religion or denomination.

This restriction does not extend to those taxes which are imposed for the general religious or charitable purposes or for all religions. Further the Article does not preclude the application of the general revenue of the State in payment of expenses for the promotion or maintenance of any particular religion.

(4) Freedom as to attendance at religious instruction or religious worship in certain educational institutions (Article 28)

Article 28 provides : No religious instruction shall be provided in any educational institution wholly maintained out of State funds. This prohibition however does not extend to any educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

Further a person attending any educational institution recognised by the State or receiving aid out of State funds shall not be required—

(a) to take part in religious instruction that may be imparted in such institution, or

(b) to attend any religious worship that may be conducted in such institution or in any premises attached thereto,

unless such person or, if such person is a minor, his guardian, has given his consent thereto.

A distinction must, however, be made between the academic study of a religion and the propagation of religious tenets. The former does not violate Article 28 whereas the latter does. In D.A.V. *College, Jullundur* v. *State of Punjab*, (1981) 2 S.C.C. 269, the Guru Nanak Dev University directed its constituent and affiliated colleges to include the life and teachings of Guru Nanak in the academic curricula. The D.A.V. College Managing Committee challenged this directive as violative of Article 28. The Supreme Court however rejected the petition.

5. CULTURAL AND EDUCATIONAL RIGHTS (Articles 29 and 30)

Articles 29 and 30, though general in nature, specially protect the interests of the linguistic and cultural minorities.

(1) Protection of interests of minorities (Article 29)

Article 29 protects the rights of 'cultural' minorities and prohibits discrimination in matters of admission to educational institutions. It guarantees two rights :

(a) Any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have the right to conserve the same.

This provision gives protection not only to religious minorities but also to linguistic minorities.

(b) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only

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of religion, race, caste, language or any of them. This right is conferred on a citizen as an 'individual' and not as a 'member of a class or a group'.

Article 15 (4) however permits the State to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(2) Right of minorities to establish and administer educational institutions (Article 30)

As an adjunct to 'protection of interests of minorities' (Article 29), Article 30 confers a right on minorities to establish and administer educational institutions. According to it—

(1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice [Article 30 (1)].

This right is available both to religious and linguistic minorities.

In *St.Stephen's College* v. *University of Delhi*, A.I.R. (1992) S.C. 1630, the Court has held that though Article 30 is couched in absolute terms unlike other Fundamental Rights, it has to be read subject to the power of the State to regulate education, educational standards and allied matters. Regulations made in the true interest and efficiency of instructions, discipline, health, sanitation, morality, public order and the like may undoutedly be imposed. However it held that the College was justified in having a separate admission programme and any attempt to regulate that could amount to interference. The Court further held that although the educational institutions established and administered by religious minorities and aided by Government should not be merely for the benefit of their community, yet some preference to students of their religion can be given.

In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under Article 30 (1) [Article 30 (1-A)].

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language [Article 30 (2)].

Meaning of 'minority'. The term 'minority' is not defined in the Constitution. In *D.A.V. College, Jullundur* v. *State of Punjab*, (1971) 2 S.C.C.269, it was held that any community, religious or linguistic, which is numerically less than 50 per cent of the population of a State, is a 'minority' community within the meaning of Article 30.

6. RIGHT TO PROPERTY (Article 31, now abolished)

Article 19 (1) (*f*) which guaranteed to every citizen the right to acquire, hold and dispose of property has been abolished by the Constitution (Forty-fourth Amendment) Act, 1978. Article 31 which was a necessary concomitant of Article 19 (1) (*f*) has also been abolished by the Constitution (Forty-fourth Amendment) Act, 1978. This Article guaranteed right of property to every person, whether a citizen or a non-citizen.

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Now Chapter IV of Part XII of the Constitution, which comprises of only one Article, *i.e.*, Article 300-A, unambiguously declares that no person shall be deprived of his property save by authority of law. This means that right to property is no longer a Fundamental Right. Article 300-A now only assures the status of the right to property only as a legal right.

SAVING OF CERTAIN LAWS

Saving of laws prohibiting acquisition of estate etc. (Article 31-A)

Notwithstanding anything contained in Article 13, the laws providing for matters mentioned below shall not be declared void on the ground that they are inconsistent with, or take away or abridge, any of the rights conferred by Article 14 or Article 19 :

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents (now abolished), secretaries and treasurers (now abolished), managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence.

Where any law [referred to in Article 31-A (1)] is made by the Legislature of a State, the provisions of Article 31-A shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent. Further where any law makes any provision for the acquisition by the State of—

(i) any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable in that area, or

(ii) any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

Validation of certain Acts and Regulations (Article 31-B)

The Ninth Schedule in the Constitution contains some Acts and Regulations none of which shall be deemed to be void, or ever to have become void, on the ground that such Act or Regulation is inconsistent with, or takes away or abridges any of the Fundamental Rights conferred

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by Part III of the Constitution (dealing with Fundamental Rights). Further, notwithstanding any judgment, decree or order of any Court or Tribunal to the contrary, each of these Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

So far 202 laws have been included in the protective umbrella of the Ninth Schedule. It is noteworthy that most of the Acts included in this Schedule relate mainly to the land reforms. Among the various laws some of the important Acts in the list are the Industries (Development and Regulation) Act, 1951, the Monopolies and Restrictive Trade Practices Act, 1969, the Foreign Exchange Regulation Act, 1973, the Essential Commodities Act, 1955, etc.

Saving of laws giving effect to certain Directive Principles (Article 31-C)

Article 31-C provides that no law giving effect to the policy of the State towards securing all or any of the Directive Principles shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31. Where, however, such law is made by the Legislature of a State, the provisions of Article 31-C shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

7. RIGHT TO CONSTITUTIONAL REMEDIES (Articles 32 to 35)

(1) Remedies for enforcement of rights conferred by Part III (Article 32)

Article 32 which guarantees remedies for the enforcement of Fundamental Rights has been described as the 'soul' of the Constitution. Rights without remedies would be just abstract declarations without any real content in them and will be of no use.

Article 32 provides in very clear and unambiguous terms remedies for enforcement of Fundamental Rights. In view of the crucial importance of this Article, it is reported below :

> "(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part (*i.e.*, Part III) is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (*i.e.*, Part III).
>
> (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Clause (2).
>
> (4) The right by this Article shall not be suspended except as otherwise provided for by this Constitution."

The various provisions of Article 32 are explained below :

(1) It provides a guaranteed remedy for the enforcement of Fundamental Rights and this remedial right is itself made a Fundamental Right, being included in Part III [*Kochunni* v. *State of Madras*, A.I.R. (1959) S.C. 75]. The Supreme Court has been empowered in this regard to grant relief to those who move the Court for the enforcement of Fundamental Rights. The jurisdiction of the Supreme Court is exercisable only for the enforcement of Fundamental

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Rights. Where there is no question of the enforcement of Fundamental Rights, Article 32 has no application (unlike the power of High Courts under Article 226).

(2) The Supreme Court has the power to issue directions, orders or writs for the enforcement of these Rights. The writs may be in the nature of —

(a) *habeas corpus* (an order requiring a person to be brought before a judge or into the Court, especially to investigate the right of the law to keep him in prison) ;

(b) *mandamus* (a writ issued by a superior Court commanding the performance of a specified official act or duty by the person to whom it is addressed) ;

(c) *prohibition* (a writ issued by a superior Court to an inferior Court forbidding the latter to continue proceedings therein in excess of its jurisdiction) ;

(d) *quo warranto* (a writ requiring a person to show by what authority he exercises a public office) ;

(e) *certiorari* (a writ of a superior Court calling forth the records and entire proceedings of an inferior Court).

Article 32 also gives power to the Court to issue any orders and directions in the *nature* of writs. Any procedural technicality which surrounds writs in English law, the source of prerogative writs, can be avoided by the Court.

(3) Parliament may by law empower any Court other than the Supreme Court to exercise within the local limits of its jurisdiction all or any powers of the Supreme Court referred to above.

(4) The right guaranteed by Article 32 cannot be suspended except as otherwise provided by Article 359 of the Constitution, *i.e.*, where a proclamation of Emergency is in operation.

In a recent case *SAHELI, a Women's Resources Centre* v. *Commr. of Police.* A.I.R. (1990) S.C. 513, the Court ordered the State payment of Rs. 75,000 as compensation for death caused of a 9 year old child due to police atrocities. This trend was started by the Court in *Rudul Sah* v. *State*, A.I.R. (1983) S.C. 1086.

(2) **Modification and restriction of rights** (Articles 33 and 34)

Article 33 is one of the exceptions to Article 13 which invalidates all laws repugnant to rights in Part III of the Constitution. It confers power on Parliament to restrict or abrogate the rights conferred by Part III in their application to—

(a) the members of the Armed Forces ; or

(b) the members of the Forces charged with the maintenance of public order ; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence ; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in the above Clauses.

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identifying legal exemption from penalities.

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(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence ; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in the above Clauses.

The idea behind the above restrictions on the personnel referred to above is to ensure the proper discharge of their duties and the maintenance of discipline among them.

The Constitution does not exclude all Government servants as a class from the protection of several rights guaranteed by Part III. Article 33 applies to the services, the members of which have been deprived from benefit of certain rights due to the nature and incidence of the duties which they have to discharge which might involve restrictions on freedoms under Article 19 (1) *(e)* and *(g)* [*Kameshwar Prasad* v. *State of Bihar* A.I.R. (1962) S.C. 1166].

Article 34 provides another exception to the foregoing provisions of Part III. It empowers Parliament to —

(a) indemnify by law any person in the service of the Union, or a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force, or

(b) validate by law any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

(3) **Legislation to give effect to the provisions of Part II** (Article 35)

Article 35 authorises Parliament (and not the Legislature of a State) to make laws—

(i) with respect to any of the matters stated below which may be provided for by law made by Parliament :

(a) Requirement as to residence prior to employment or appointment to an office under the Government [Article 16 (3)] ;

(b) Delegation of powers exercisable by the Supreme Court under Article 32 (3) to any other Court [Article 32 (3)] ;

(c) Modification of rights conferred by Part III in their application to the Armed Forces (Article 33) ;

(d) Restriction on rights conferred by Part III while martial law is in force in any area (Article 34).

(ii) for prescribing punishment for those acts which are declared to be offences under Part III.

However, laws which were already in force at the commencement of the Constitution are saved in respect to matters referred to in Article 35 until they are altered, repealed or amended by Parliament.

DIRECTIVE PRINCIPLES OF STATE POLICY

Our Constitution lays down a set of guiding principles which the State ought to follow both in framing laws and enforcing them. These principles are called 'Directive Principles of State Policy' and are contained in Part IV of the Constitution. They confer no legal rights and create no legal remedies, But

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still they provide a good guide in charting the path of the State in the governance of the country.

The Directive Principles are more or less elaboration of the principles, ideals and aspirations contained in the Preamble. The essence of these principles is contained in Article 38 (1) which, echoing the Preamble, reads :

> "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life."

Article 38, together with the provisions contained in Articles 32 to 51, constitutes "a comprehensive political, social and economic manifesto of a modern democratic State."

Definition of State (Article 36). In Part IV, unless the context otherwise requires, 'the State' has the same meaning as in Part III. Refer to Article 12.

Application of the principles contained in Part IV (Article 37). Article 37 provides : "The provisions contained in this Part (Part IV) shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."

The Directive Principles may be described as the active obligations of the State. The main difference between the Fundamental Rights and the Directive Principles is that while the former impose negative duties on the State (*i.e.*, not to do certain things), the latter impose positive duties (*i.e.*, to do certain things) to secure a social order where social, economic and political justice pervades national life. But the Directive Principles, unlike the Fundamental Rights, are not enforceable by Courts. Again if the Government is unable to carry out these Directives, there is no legal remedy. No individual in any capacity can compel the State to implement the Directive Principles through judicial proceedings in a Court of law. But it is now very well established that the Directive Principles are as much fundamental as any other provisions of the Constitution. At one time the view expressed by the Supreme Court in *State of Madras* v. *Champakam Dorairajan*, A.I.R. (1951) S.C. 226 was that :

> "The Directive Principles of State Policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in Part III (dealing, with Fundamental Rights)... The Chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate Article in Part III. The Directive Principles...have to conform to and run as subsidiary to the Chapter of Fundamental Rights."

This view has now been supplemented by the doctrine of harmonious construction and it has been held that the Directive Principles and Fundamental Rights form an organic unit and are supplementary to each other [*State of Bihar* v. *Kameshwar Singh*, A.I.R. (1952) S.C. 252 ; In *re Kerala Education Bill Case*, A.I.R. (1958) S.C. 956]. In *Keshwananda Bharti* v. *State of Kerala*, A.I.R. (1973) S.C.1461, it was also held that the Court must look to the Directive Principles while examining the constitutional validity of laws. According to the former Supreme Court Judge Sh. V.R. Krishna Iyer also the Directive Principles of State Policy (Part IV of the Constitution) and the Fundamental Rights

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(Part III of the Constitution) are complementary to each other and the question of primacy of one over the other is a 'judicial discovery'.

The Courts, without making the Directive Principles justiciable, began to implement the values underlying these Principles. For instance while reviewing the reasonableness of restrictions under Article 19 (2) to (6), the Directive Principles are also taken into consideration and restrictions which promote any Directive Principle can be rightly considered reasonable [*State of Bombay* v. *F.N. Balsara*, A.I.R. (1951) S.C.318]. Further, the introduction of Article 31-C by the Constitution (Twenty-fifth Amendment) Act, 1971 protects the directives in Article 39 *(b)* and *(c)* from the challenge of unconstitutionality on the ground of contravention of Articles 14, 19 and 31. The Constitution (Forty-second Amendment) Act, 1976 expanded the scope of Article 31-C, whereby Articles 14 and 19 shall not stand in the way of implementing any of the Directives.

To sum up, the following observation may be noted :

> "It is important, and positively essential, to keep in mind that the non-legal, non-justiciable Directive Principles were accorded a very high and honourable position in the scheme of the Indian Constitution by its framers. In the task of realizing a social welfare State through the process of social legislation and economic development, the Directive Principles were to play as major and effective a role as was assigned to the legally enforceable Fundamental Rights." [S.N.Ray, *Judicial Review and Fundamental Rights*, p.117].

It will also not be out of the place to mention here that the Fundamental Rights and Directive Principles of State Policy, together with the Preamble, sum up the philosophy of our Constitution.

Directive Principles compared with Fundamental Rights

1. The Directive Principles are like Instruments of Instructions to the Legislature and the Executive to do certain things and to achieve certain objectives by their actions. The Fundamental Rights, on the other hand, impose certain limitations upon State action, *i.e.*, the State is prohibited from doing certain things.

The Instruments of Instructions were issued to the Governor-General and to the Governors of the Colonies and to those of India by the British Government under the Government of India Act, 1935.

2. The Directive Principles are not enforceable by any Court in terms of the express provisions of Article 37 of the Constitution while Fundamental Rights are enforceable by the Supreme Court and the High Courts in terms of the express provisions of Articles 32 and 226 of the Constitution.

3. A competent Court may declare a law which contravenes a Fundamental Right as void but it cannot do so if it is contrary to Directive Principles.

CLASSIFICATION OF DIRECTIVE PRINCIPLES

The Directive principles may be classified under the following three heads :

Directives in the nature of ideals of the State

(1) *Promotion of welfare.* The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in

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which justice, social, economic and political, shall inform all the institutions of the national life.

The State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations (Article 38).

(2) *Equitable distribution of resources and prevention of concentration of wealth.* The State shall direct its policy towards securing —

(a) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good.

(b) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment [Article 39 *(b)* and *(c)*].

(3) *Equal justice and free legal aid.* The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39-A).

(4) *Living wage etc. for workers.* The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities (Article 43).

(5) *Duty of the State to raise the level of nutrition and the standard of living and to improve public health.* The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties (Article 47).

(6) *Promotion of international peace and security.* The State shall endeavour to —

(a) promote international peace and security ;

(b) maintain just and honourable relations between nations ;

(c) foster respect for international law and treaty obligations in the dealings of organised people with one another ; and

(d) encourage settlement of international disputes by arbitration (Article 51).

2. Directives shaping the policy of the State

(1) *Organisation of village panchayats.* The State shall take steps to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government (Article 40).

(2) *Promotion of cottage industries.* The State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas (Article 43).

(3) *Participation of workers in management of industries.* The State shall take steps, by suitable legislation or in any other way, to secure the participa-

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tion of workers in the management of undertakings, establishments or other organisations engaged in any industry (Article 43-A).

(4) *Uniform civil code for the citizens.* The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India (Article 44).

(5) *Free and compulsory education for children.* The State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of 14 years (Article 45).

(6) *Promotion of education and economic interests of Schedules Castes, Scheduled Tribes and other weaker sections.* The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation (Article 46).

(7) *Prohibition of consumption of liquor and intoxicating drugs.* The State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health (Article 47).

(8) *Organisation of agriculture and animal husbandry.* The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter of cows and calves and other milch and draught cattle (Article 48).

(9) *Protection and improvement of environment and safeguard of forests and wild life.* The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country (Article 48-A).

(10) *Protection of monuments and places and objects of national importance.* It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be (Article 49).

(11) *Separation of judiciary from executive.* The State shall take steps to separate the judiciary from the executive in the public services of the State (Article 50).

3. Directives conferring non-justiciable rights

(1) *Certain principles of policy to be followed by the State.* The State shall, particularly, direct its policy towards securing —

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood ;

(b) that there is equal pay for equal work for both men and women ;

(c) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength ;

(d) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment [Article 39 *(a)*, *(d)* to *(f)*].

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(2) *Right to work, to education and to public assistance in certain cases.* The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and in other cases of undeserved want (Article 41).

(3) *Provision for just and humane conditions of work and maternity relief.* The State shall make provision for securing just and humane canditions of work and for maternity relief (Article 42)

FUNDAMENTAL DUTIES (Sec.51-A)

Rights always flow out of duties. They always go together and act as a balancing force in any civilised society. Article 51-A as introduced by the Constitution (Forty-second) Amendment Act, 1976 enumerates the Fundamental Duties of the citizens of India. These Duties like the Directives are also not enforceable in Law Courts.

Article 51-A provides that it shall be the duty of every citizen of India —

(a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem ;

(b) to cherish and follow the noble ideals which inspired our national struggle for freedom :

(c) to uphold and protect the sovereign unity and integrity of India ;

(d) to defend the country and render national service when called upon to do so ;

(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities ; to renounce practices derogatory to the dignity of women ;

(f) to value and preserve the rich heritage of our composite culture ;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures ;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform ;

(i) to safeguard public property and to abjure violence ;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

ORDINANCE-MAKING POWERS

1. Of the President

Article 52 of the Constitution declares that "there shall be a President of India." The President of India is the executive head of the Union and all executive power finds its source from him.

Article 53 (1) expressly declares that "the executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution." It does not define what the meaning and scope of 'executive power' is and it is Article 73 which merely lays down the extent of executive power of the Union.

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In simple words, 'executive power' or 'executive functions' can be said to be those residual Governmental powers or functions which are left if legislative and judicial functions are taken away. In modern times the strict demarcation of functions between the executive, legislature and judiciary is vanishing. Nowadays the executive exercises legislative and judicial functions also. For instance, power to frame rules, regulations and notifications, essentially a legislative function, is often entrusted to the executive. Similarly executive is also entrusted with judicial authority, like granting of pardons etc. Therefore the various powers of the 'executive' can be categorised under four heads :

(a) Administrative power, including execution of laws and administration of various departments of Government [Article 53 (1)].

(b) Legislative power, including power to frame rules, regulations, notifications and promulgate Ordinances (Article 123).

(c) Judicial power, including power to grant pardons and to suspend, remit or commute sentences in certain cases (Article 72).

(d) Military power, including the Supreme command of the Defence Forces of the union [Article 53 (2)].

Ordiance-making power of the President (Article 123). Ordinarily the power to make laws for the Union or any part thereof is a legislative function and hence belongs to Parliament. But there are times when it is not possible for Parliament to legislate, like in times when it is not in session and there is an urgent need for an enactment. Article 123 provides for such a contingency when the President may promulgate Ordinances. These Ordinances although of temporary duration have the same force and effect as any other Act passed by Parliament. An Ordinance like any other law may be retrospective in nature, it may amend or repeal any law made by Parliament itself. However, Ordinances promulgated by the President are subject to the following limitations :

(1) The Ordinance must be promulgated when both Houses of Parliament are not in session. The session of a House comes to an end on its prerogation or dissolution. If one House is sitting, it is no bar to the issuance of an Ordinance.

(2) The President must be satisfied that circumstances exist which render it necessary for him to take immediate action.

(3) Every Ordinance made by the President must be laid before both Houses of Parliament and it ceases to operate at the expiration of 6 weeks after the reassembly of both Houses. The Ordinance can also cease to have effect if both Houses pass a resolution disapproving that Ordinance. If the Ordinance is allowed to lapse without being placed before Parliament it cannot be treated as *void ab initio* and acts done and completed under it before it ceases to operate remain fully valid and effective. Thus an office abolished by an Ordinance does not revive after the Ordinance ceases to operate without being placed before the Parliament [*T. Venkata Reddy* v. *State of A.P.*, A.I.R. (1085) S.C. 724]. However, the President can withdraw the Ordinance at any time at his will.

(4) An Ordinance made by the President is subject to the same limitations as to a law made by Parliament.

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The power of the President to promulgate Ordinance is not totally immune from judicial review. The satisfaction of the President that circumstances exist for immediate action, which is one of the preconditions, is not to be treated as a mere political question [*A.K.Roy* v. *Union of India* (1982) 1 S.C.C.270].

2. Of the Governor

Article 153 of the Constitution declares that "there shall be a Governor for each State." Two or more States can have a common Governor.

The Governor of a State is the executive head of the State and all executive power emanates from him (Article 154). Unlike the President the Governor of a State is not elected but is appointed by the President and holds office during the pleasure of the President (Articles 155 and 156). The Constitutional position of the Governor in relation to the Legislature and administration is the same as that of the Union President. Like the President, the Governor possesses executive, legislative and judicial powers, except that he has no diplomatic or military powers.

Ordinance-making power of the Governor (Article 213). The power of the Governor to promulgate Ordinances during recess of Legislature is given in Article 213. This power of the Governor, which is subject to some additional limitations, is similar to the President's powers under Article 123. The additional limitations are as follows :

The Governor shall not promulgate an Ordinance without instructions from the President if —

(i) a bill containing the same provisions would have required the previous sanction of the President for the introduction thereof into the Legislature (Article 282 and Proviso to Article 304), or

(ii) the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President (Article 200), or

(iii) an Act of the State Legislature containing the same provisions would have been invalid if not reserved for the consideration of the President [Articles 31 (3), 254 (2), 286 (3) and 288 (2)].

As to matters enumerated in the Concurrent List of the Seventh Schedule, both the Union and the State Legislatures have power to legislate. But in cases where a State law is repugnant to a Union law on the same subject, it shall be void, to the extent of repugnancy. Article 254 (2) provides that in cases where the State law is reserved for assent of the President and which assent is received, that law is valid and operative in the State, even if it is repugnant to a Union law. Similarly a repugnant Ordinance is also saved if it is made in pursuance of instructions from the President [Proviso to Article 213 (3)].

DISTRIBUTION OF LEGISLATIVE POWERS

India is a Union of States [Article 1 (1)]. The basic structure of the Government of India is federal. According to Dicey, "Federation means the distribution of the force of the State among a number of co-ordinate bodies, each originating in and controlled by the Constitution." Although there are two levels of government in India, *i.e.*, the Central Government and the State Governments, they are not subordinate to each other. They exercise their jurisdiction concurrently and independently.

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In India, there are two sets of Government in the country for its governance, *viz.*,

1. **The Central Government,** called the Union of India, which has legislative and administrative jurisdisction in respect of certain matters over the territory of India which comprises of —

(a) the territories of the States ;

(b) the Union Territories as specified in the First Schedule ; and

(c) such other territories as may be acquired.

The First Schedule to the Constitution contains the List of the States (Part I) and the Union Territories (Part II). There are at present the following 25 States in the Union of India :

1. Andhra Pradesh ; 2. Arunachal Pradesh ; 3. Assam ; 4. Bihar ; 5. Goa ; 6. Gujarat ; 7. Haryana ; 8. Himachal Pradesh ; 9. Jammu and Kashmir ; 10. Karnataka ; 11. Kerala ; 12. Madhya Pradesh ; 13. Maharashtra ; 14. Manipur; 15. Meghalaya ; 16. Mizoram ; 17. Nagaland ; 18. Orissa ; 19. Punjab ; 20. Rajasthan ; 21. Sikkim ; 22. Tamil Nadu ; 23. Tripura ; 24. Uttar Pradesh ; 25. West Bengal.

There are at present 7 Union Territories. They are :

1. The Andaman and Nicobar Islands ; 2. Chandigarh ; 3. Dadra and Nagar Haveli ; 4. Daman and Diu ; 5. Delhi ; 6. Lakshadweep ; 7. Pondicherry.

2. **The State Governments.** Every State has its own separate Government which is on the lines of the Central or Union Government. It owes its existence to the Constitution and its powers are defined by the Constitution itself.

Besides the States there are a number of Union Territories which are administered directly by the President of India. The Government in a Union Territory has no independent status under the Constitution.

As pointed out earlier, when there is a division of functions between a Central Government and the State Governments, there is a *federal form of* Government. When the Indian Federation was established, the founder fathers of the Constitution were fully aware that in the practical functioning of the Union and State Governments some conflicts were bound to arise. They, therefore, provided a separate Part, *i.e.*, Part XI, in the Constitution on "Union-State Relations" so that the Union and State Governments work in harmony in their respective jurisdictions which have been defined by the Constitution itself. Further, the powers of the Union and the State Governments in their respective jurisdictions have also been clearly defined.

Part XI of the Constitution discusses (1) legislative relations and (2) administrative relations between the Union and the States. But in this Chapter, we shall talk of legislative relations only.

UNION-STATE RELATIONS—LEGISLATIVE

Chapter 1 of Part XI of the Constitution, along with the Seventh Schedule thereto, governs the legislative relationship between the Union and the States on the basis of :

(1) extent of laws made by Parliament and the State Legislatures (*i.e.*, as regards territory) ; and

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(2) subject-matter of laws made by Parliament and the State Legislatures.

1. Extent of laws made by Parliament and the State Legislatures (Article 245)

Article 245 (1) deals with the territorial jurisdiction of the Union Government and State Government as regards their power of law-making. According to it, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. This is, however, subject to the other provisions of the Constitution.

A State Legislature can under no circumstances enlarge its territorial jurisdiction except when the boundaries of the State itself are extended by an Act of Parliament. Parliament, on the other hand, has the power to legislate not only for 'the whole or any part of the territory of India' but also has the power of extra-territorial legislation. Article 245 (2) specifically provides in this regard as follows : "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation."

Laws made by Parliament extend not only over the entire territory of India but also outside India. Suppose a Hindu goes to England and contracts a second marriage there. If his first wife is alive, he is as much punishable for second marriage as he would have been had he contracted this marriage in India. Although the Union Legislature has this extra-territorial jurisdiction, there are real practical difficulties in its enforcement.

The territorial jurisdiction of a State Legislature however does not extend beyond its territorial limits. A State law having extra-territorial jurisdiction can be sustained if a territorial *nexus* is established, *i.e.*, when there is sufficient connection between the State making the law and the subject-matter of legislation. The connection between the two must be real and not illusory [*State of Bombay* v. *R.M.D. Chamarbaughwala*, A.I.R. (1957) S.C.699].

The Union Territories are directly administered by the Central Executive (Article 239). The President administers the Union Territories through an Administrator, subject to any law made by Parliament. Article 239-A empowers Parliament to create a Legislature or a Council of Ministers or both for certain Union Territories.

2. Subject-matter of laws made by Parliament and by the State Legislatures (Article 246 and Schedule VII)

As regards subject-matter of laws, the Constitution substantially follows the pattern of the Government of India Act, 1935, and adopts from it a three-fold distribution of legislative powers between the Union and the States.[1]

1. In the U.S.A. and Australia, there is only a short list of the subjects on which the Federal Government alone can legislate : on other subjects both the Federal Government and the States can legislate. In Canada, there are three lists of subjects : one includes subjects on which only the Central Government can legislate ; the second consists of subjects on which the State Governments have exclusive power to legislate; the third comprises the items on which both the Central Government and the State Governments can legislate ; the residuary subjects fall within the Central jurisdiction. The Government of India Act, 1935 followed more or less the Canadian pattern.

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Schedule VII to the Constitution contains three Lists (List I or the Union List, List II or the State List and List III or the Concurrent List) which enumerate the possible subjects of legislation on which the Union and the States may legislate.

Article 246 confers exclusive power of legislation on Parliament in respect of any of the matters enumerated in List I (referred to as the Union List) [Article 246 (1)] and on the State Legislatures in respect of matters enumerated in List II (referred to as the State List) [Article 246 (3)]. As regards matters contained in List III (referred to as the Concurrent List), both Parliament and the State Legislatures may legislate [Article 246 (2)]. Parliament has, however, power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List [Article 246 (4)].

List I or the Union List includes subjects over which Parliament has the exclusive power to legislate. The List contains 97 items which may be conveniently grouped under the following 12 heads :

(a) Defence ; *(b)* Foreign affairs ; *(c)* Citizenship ; *(d)* Communications ; *(e)* Property ; *(f)* Currency and coinage ; *(g)* Trade and commerce ; *(h)* Institutions of national importance ; *(i)* Census, inquiries and statistics ; *(j)* Elections and public services ; *(k)* Judiciary ; and *(l)* Union levies, taxes and duties.

A perusal of the above subjects indicates that these are predominantly the matters of national interest or importance, and there is a need for national control or uniformity of policy throughout the country so far as the matters are concerned.

List II or the State List comprises 66 entries over which the State Legislatures have the exclusive power to legislate. This List includes items like public health and sanitation ; pilgrimages ; libraries and museums financed by the State ; communications, *i.e.*, roads, bridges, ferries ; agriculture ; fisheries ; trade and commerce within the State ; markets and fairs ; education ; betting and gambling ; State taxes and duties. It is obvious that this List contains subjects which are of regional interest and of which local control is more expedient.

List III or the Concurrent List contains 47 entries over which both Parliament and the State Legislatures can legislate. This List includes subjects such as criminal law ; marriage and divorce ; transfer of property ; contracts ; actionabe wrongs ; bankruptcy and insolvency ; trusts and trustees ; aduletration of foodstuffs ; economic and social planning ; population control and family planning ; commercial and industrial monopolies ; trade unions ; social security and social insurance ; welfare of labour ; legal, medical and other professions ; price control; factories ; electricity ; newspapers ; acquisition and requisitioning of property ; and stamp duties.

Residuary powers of legislation (Article 248). Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. Such power shall include the power of making any law imposing a tax not mentioned in either of the these Lists.

Article 246 (4) also confers residuary legislative powers on Parliament. The obvious conclusion is that the Constitution leans heavily in favour of Parliament. This is what the founder fathers of the Constitution also intended.

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Rules of interpretation of the Legislative Lists

In determining the respective jurisdiction of the Union and the State Legislatures, the following rules of interpretation are helpful :

1. *Plenary powers of the Legislature* . The power of a Legislature to enact any legislation within its competence is plenary. This power is however subject to any limitation or prohibition imposed by the Constitution itself. Once a topic of legislation is in any entry of any of the Lists any limitation on such power, if any, has to be found there only. In *Jagannath Baksh Singh* v. *State of U.P.*, A.I.R. (1962) S.C.1563, the Supreme Court pointed out that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. This view was reiterated by the Court in *Ujagar Prints* v. *Union of India*, A.I.R. (1989) S.C. 516.

2. *Retrospectivity*. The legislative power conferred on the Legislature to enact laws relating to the various entries in the Seventh Schedule can be exercised both prospectively and retrospectively [*Harilal Rattanlal* v. *State of U.P.*, (1973) 1 S.C.C. 216].

3. *Predominance of the Union Power*. The non obstante (not with standing) clause used in Article 246 (1) ['Notwithstanding anything in Clauses (2) and (3)'] and the words of Clause (3) ['Subject to Clause (1) and (2)'] clearly point out that if the legislative powers of the Union and State Legislatures in Lists I and II cannot be reconciled reasonably, the latter has to give way to the former. Similarly if there is conflict or overlapping between List I and List III or List II and List III, Union power shall prevail [*Union of India* v. *H.S.Dhillon*, (1971) 2 S.C.C.779].

4. *Harmonious construction*. In cases of conflict between different entries in different Lists, it is the duty of the Courts to reconcile the entries and bring about harmony between them. The two entries must be read together and the language of one interpreted and, where necessary, modified by that of the other. The Courts should try to give effect to each of the two conflicting entries [*O.N. Mahindroo* v. *Bar Council*, A.I.R. (1968) S.C. 888]. In this case the constitutionality of the Advocates Act, 1961, a Union law, was challenged. The Act concerned the qualifications, enrolment, right to practise and discipline of the advocates. The relevant entries were 77 and 78 of List 1—'persons entitled to practise before the Supreme Court and High Court' and entry 26 in List III—'legal, medical and, other professions'. The Supreme Court applied the rule of harmonious construction and held that Parliament is exclusively empowered to legislate in respect of persons entitled to practise in the Supreme Court or High Courts, and power to legislate in respect of the rest of the practitioners falls under entry 26 of List III.

5. *Pith and substance* . The rule of 'pith and substance' is applied when a law dealing with a subject in one list also touches a subject in another List. In such cases the pith and substance of the legislation, *i.e.*, the true object of legislation, is to be determined. If on such examination it is found that the legislation in its essence is within the legislative competence of the Legislature which enacted it, it is valid even if it accidentally encroaches on a subject in another List.

In ascertaining the pith and substance of the impugned legislation regard must be had to the enactment as a whole, to its objects and to the scope and

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effect of its provisions [*Prafulla Kumar* v. *Bank of Commerce*, A.I.R. (1947) P.C. 60]. In this case the constitutional validity of the Bengal Money Lenders' Act, 1946, which provided for limiting the amount and rate of interest recoverable by a lender on any loan, was challenged on the ground that it was *ultra vires* the Bengal Legislature. The appellants contended that the Act was valid as it dealt with 'money-lending' and 'money lenders' in the province—a matter within the exclusive competence of the Provincial Legislature (now State Legislature) under entry 27 (now entry 30) of List II. The respondents contended that the Act was *ultra vires* as it affected rights of promissory-note holders to recover the full amount on their promissory notes—entry 28 (now entry 46) of List 1 which assigned to the Federal Legislature (now Parliament) exclusive authority to make laws with respect to "cheques, bills of exchange, promissory notes, and other like instruments". The Privy Council held that the Act was not void. The *pith and substance* of the Act being money lending it came within entry 27 (now entry 30) of List II of the Government of India Act, 1935, and was not rendered invalid, because it incidentally affected matters reserved to the Federal legislation.

6. *Ancillary legislation.* The power to legislate on a topic of legislation includes the power to legislate on any ancillary matter which can be reasonably included in that power [*State of Rajasthan* v. *G. Chawla* , A.I.R. (1959) S.C. 544]. It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction. They are words of wide amplitude and they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution. A general word used in an entry..... must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it [*Jagannath Baksh Singh* v. *State of U.P.*, A.I.R. (1962) S.C.1563 ; *India Cement Ltd.* v. *State of T.N.*, A.I.R. (1990) S.C. 85].

7. *Colourable legislation.* "You cannot do indirectly what you cannot do directly." The object of distribution of legislative powers to different Legislatures is that they ought to act within their respective boundaries marked by the specific entries in the Seventh Schedule. There are some cases where a Legislature passes an Act which outwardly purports to be within its legislative competence but in substance it covers a subject not within its powers. Such kind of indirect, covert and disguised transgression is not allowed and the Court can strike down the enactment in such cases. The doctrine of colourable legislation is relevant only in connection with the question of legislative competency. Objections based on colourable legislation have relevance only in situations when the power is restricted to particular topics, and an attempt is made to escape legal fetters imposed on its powers by resorting to forms of legislation calculated to mask the real subject-matter. Further, if a Legislature has, in fact, power to make the law, its motives in making the law are irrelevant. Therefore the doctrine of colourable legislation does not touch ambit of the power or the motives behind exercise of the power, but only the manner of its exercise.

In relation to constitutional prohibitions binding a Legislature it is clear that the Legislature cannot obey the prohibitions merely by employing indirect methods of achieving exactly the same result. Therefore, in all such cases the Court has to look behind the names, forms, appearances, to discover the true

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character and nature of the legislation. In *M.R.Balaji* v. *State of Mysore*, A.I.R. (1963) S.C. 649, the Supreme Court held that the reservation of 68 per cent of seats for admission of backward classes to educational institutions by the impugned order of the State is plainly inconsistent with the concept of special provision contained in Article 15 (4). The impugned order was found as amounting to fraud on the constitutional power. If the executive action does not patently or overtly transgresses the authority conferred on it by the Constitution the covert or latent transgression can be struck down as being a fraud on the relevant constitutional provision.

Inconsistency between laws made by Parliament and laws made by the Legislatures of States (Article 254)

Overlapping. In case of overlapping of a matter in List I, II and III, and in case reconciliation between the two items is not possible, it is Parliament which alone is competent to legislate on that subject [*Union of Inida* v. *H.S. Dhillon*, (1971) 2 S.C.C. 779]. This means the power of the State Legislature to legislate with respect to matters enumerated in the State List is subject to the power of Parliament to legislate in respect of matters enumerated in the Union and Concurrent Lists.

Repugnancy. When both Parliament and a State Legislature make law on the same subject (*i.e.*, a subject included in the Concurrent List), the Union law will prevail over the State law, and the State law shall to the extent of the repugnancy be void. This applies to the existing laws of the States also. Article 254 (1) provides in this regard as follows :

> "If any provisions of a law made by the Legislature of a State is repugnant to any provision of law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void."

Article 254 (2) lays down the circumstances in which a State law on a subject in the Concurrent List will be valid if it is repugnant to the Union law. The general rule is that in case of repugnancy between a Union and a State law on the same subject (*i.e.*, a subject included in the Concurrent List), the Union law will prevail over the State law. If, however, the State law was reserved for the consideration of the President and has received his assent, the State law will prevail in the State notwithstanding the repugnancy but nothing prevents Parliament to override such State law by a subsequent law. Article 254 (2) which explains this point is reproduced below :

> "Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State :
>
> Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

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Power of Parliament to legislate on a matter in the State List

Article 246 provides for the threefold distribution of legislative powers between the Union and the States. List II or the State List enumerates the subjects on which the State Legislature has the exclusive power of legislation, and in normal circumstances, Parliament has no power to encroach upon and legislate on the State subjects. However, in some exceptional or extraordinary circumstances, the threefold distribution of legislative powers may be suspended, or the powers of Parliament may be extended over the State subjects. These exceptional or extraordinary circumstances are as follows :

1. *In the national interest* (Article 249). Parliament has the power to make a law with respect to any matter enumerated in the State List if the Council of States (*i.e.*, Rajya Sabha) declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to that matter specified in the resolution. If such a resolution is passed, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. The resolution shall remain in force for a period not exceeding 1 year. The resolution thus gives a lease of 1 year to the law made by Parliament. Fresh resolutions at the end of every year can extend the life of the law.

A law made by Parliament which Parliament would not but for the passing of the resolution referred to above have been competent to make, shall, to the extent of the incompetency, cease to have effect on the expiration of a period of 6 months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

2. *During a proclamation of Emergency* (Article 250). If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

While a Proclamation of Emergency is in operation Parliament will have power to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the State List.

A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of 6 months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

3. *By agreement between States* (Article 252). If it appears to the Legislatures of two or more States to be desirable that on any particular items, included in the State List, there should be a common legislation for such States, they shall pass resolutions in the Legislatures to request Parliament to make such law on the particular items. If such a request is made after resolutions to that effect are passed by the Legislatures of those States, it shall be lawful for Parliament to pass an Act for regulating that matter accordingly.

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Any Act so passed by Parliament shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the Legislature of that State.

Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

This power of Parliament to pass to an Act is extension of its juridsiction by consent of the State Legislatures.

4. *Legislation for giving effect to international agreements* (Article 253). Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body. This means for carrying out international obligations, the normal distribution of powers will not stand in the way of Parliament to enact legislation and even though the subject of legislation may be included in the State List, Parliament shall have the power of legislation.

5. *Breakdown of Constitutional machinery in a State* [Article 356 (*b*)]. If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, the President may by Proclamation declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

FREEDOM OF TRADE, COMMERCE AND INTERCOURSE

Part XIII of the Constitution deals with "Trade, Commerce and Intercourse within the Territory of India". Article 301 provides : "Subject to other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free." The freedom declared by Article 301 may be defined as a right to free movement of persons or things, tangible or intangible, commercial or non-commerical, unobstructed by barriers, inter-State or intra-State or any other impediments operating as such barriers. The object of Article 301 is to break down the barriers between the States and to make the country as one unit with a view to encourage trade and commerce. It is important to note that the freedom of trade and commerce is not subject to other provisions of the Constitution but only to the provisions of Part XIII. Before further elaborating the scope of Article 301 it is important to know the meaning and scope of the words 'trade', 'commerce' and 'intercourse'.

Trade and commerce. 'Trade' in its wide import covers not merely 'buying and selling of goods' but trading facilities like advances, overdrafts, mercantile documents, trading intelligence, telegraphic and telephonic conversations, banking and insurance and many other sophisticated operations connected with and essential for commerce and intercourse. Even travel facilities in certain circumstances have a nexus with trade and commerce [*Fatehchand* v. *State of Maharashtra*, (1977) 2 S.S.C. 670].

The word 'business' is ordinarily synonymous with the word 'trade'. It connotes some real, substantial and systematic or organised course of activity or conduct with the purpose of earning profit.

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Trade and commerce which are protected by Article 301 are only those activities which are regarded as lawful trading activities and are not against public policy [*State of Bombay* v. *R.M.D Chamarbhaugwala*, A.I.R. (1957) S.C. 699].

Intercourse. The world 'intercourse' in this Article is of wide import. It will cover all such commercial intercourse as might not be included in the words 'trade and commerce'.

Scope of Article 301. The words 'throughout the territory of India' in Article 301 clearly indicate that the freedom guaranteed to trade, commerce and intercourse is not only inter-State but also intra-State. Further, any restrictions which directly and immediately restrict or impede the free flow or movement of trade fall within the purview of Article 301. One such example of restrictions is taxes which directly affect the free flow of trade [*Atiabari Tea Co.* v. *State of Assam*, A.I.R. (1961) S.C. 232]. As a further observation it has been held that regulations that facilitate the freedom of trade and commerce and compensatory taxes are also saved from the attack of Article 301 [*Automobile Transport Ltd* v. *State of Rajasthan*, A.I.R. (1962) S.C. 1406].

In *G.K. Krishnan* v. *State of T.N.*, A.I.R. (1975) S.C. 583, the validity of a Government order increasing the rate of tax on omnibuses from Rs. 30 to Rs.100 per seat per quarter was upheld on the ground that the tax was compensatory. The State could prove that it was spending more than what it was earning from goods and passenger tax and tax on vehicles.

In *Malva Bus Service (Pvt.) Ltd.* v. *State of Punjab*, A.I.R. (1983) S.C. 634 the Supreme Court upheld the enhancement of tax under the Punjab Motor Vehicles Taxation Act, 1981, even though the State was shown to be spending less on the roads than what it was collecting by way of tax. The Court said that in addition to expenditure on roads other expenditures of the State facilitating orderly and safe movement of traffic have also to be taken into account. What is necessary to uphold a regulatory and compensatory tax is the existence of a specific, identifiable object behind the levy and a nexus between the subject and object of the levy.

The test for adjudging the validity of a law on grounds of Article 301 is :

(i) a measure which operates on trade, commerce and intercourse indirectly and remotely is not violative of Article 301;

(ii) a measure which operates on trade, commerce and intercourse directly and immediately may be violative of Article 301;

(iii) a measure which operates on trade, commerce and intercourse directly and immediately may not be violative of Article 301 provided it *(a)* is regulatory, or *(b)* imposes compensatory taxes, for the use of trading facilities.

Exceptions. The freedom of trade and commerce between the States is not made absolute but is subject to the following exceptions :

1. *Power of Parliament to impose restrictions on trade, commerce and intercourse* (See. 302). Parliament is empowered to impose such restrictions on the freedom of trade, commerce and intercourse between one State and another or within any part of the territory of India, as may be necessary for

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the public interest. The question whether a restriction imposed by Parliament by law is in public interest or not is not justiciable in Court. Also, although Article 302 does not speak of reasonableness of restrictions yet it is evident that the restrictions must bear a reasonable nexus with the need to serve public interest.

2. *Restrictions on the legislative powers of the Union and of the States with regard to trade and commerce* (Article 303). Parliament or State Legislatures shall not have the power to make any law giving any preference to any one State over another by virtue of any entry relating to trade and commerce in any of the lists in Schedule VII of the Constitution. However, in cases of famine or scarcity of goods in any part of India, Parliament shall have power to discriminate among States.

3. *Restrictions on trade, commerce and intercourse among States* (Article 304). The Legislature of a State may by law impose any tax on goods imported from other States to which similar goods manufactured in that State are subject. But a tax imposed with the object of discriminating between imported goods and those manufactured or produced within the State shall be invalid. In *Associated Tanners* v. *C.T. Officer*, A.I.R. (1987) S.C. 1922, the Supreme Court held that prohibition against discriminatory rates of tax on goods imported from other States is in Legislature of a State and not in Parliament.

Further the Legislature of a State may by law impose reasonable restrictions on the freedom of trade, commerce and intercourse with or within that State in the interest of public provided *(i)* the legislation is not discriminatory, and *(ii)* no bill imposing such restrictions is introduced in the State Legislature without the previous sanction of the President. However, in this case the requirements of public interest and reasonableness of the restrictions are justiciable issues.

4. *Saving of existing laws and laws providing for State monopolies* (Article 305). Laws which were already in force at the commencement of the Constitution shall not be affected by Articles 301 to 303, unless the President orders otherwise.

Laws made under Article 19 (6) *(ii)* which create State monopoly are saved from attack of Articles 301 to 303.

Article 307 empowers Parliament to appoint any authority to carry out the purposes of Articles 301 to 304.

Services under the Union and the States. Part XIV of the Constitution deals with Services under the Union and the States and Public Service Commissions. Chapter I (Articles 308 to 314) deals with Services. Article 309 provides that the appropriate Legislatures (*i.e.*, the Union Legislature and the State Legislatures) may legislate to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. However, the rules made must not violate Articles 14 and 16. Article 310 provides that the defence and other armed forces of the Union and the All India Services shall be within the exclusive jurisdiction of the Union. Article 311 provides for Constitutional safeguards to Civil Servants.

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Chapter II (Articles 315 to 323) of Part XIV of the Constitution deals wit' Public Service Commissions.

CONSTITUTIONAL PROVISIONS RELATING TO STATE MONOPOLY

Article 19 (6) of the Constitution provides that the State can impose reasonable restrictions on the right of citizens to practise any profession or to carry on any occupation, trade or business in the interest of general public. These restrictions can be imposed by way of —

(i) laying down professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business [Article 19 (6) *(i)*] ;

(ii) carrying on by State or a corporation owned and controlled by the State, any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise [Article 19 (6) *(ii)*].

This provision of creation of State monopoly was added in the Constitution by the Constitution (First Amendment) Act, 1951.

The inclusion of Article 19 (6) *(ii)* means that the creation of State monopolies shall not be considered to deprive a citizen of the freedom of trade and occupation. In *Akadasi Pradhan* v. *State of Orissa* , A.I.R. (1963) S.C. 1047, the Supreme Court has held that "the validity of a law creating State monopoly or permitting nationalization of a trade or business shall not be open to challenge either on the gound that the restrictions imposed by it are unreasonable or that they are not in the interest of the general public."

It is important to note that it is only the provisions which have a direct relation to creation of State monopoly which are protected under Article 19 (6) *(ii)*. Any provision in the Act which is incidental or subsidiary to the operation of the State monopoly shall still be liable to be tested with the touchstone of reasonableness of restriction and whether it is in the interest of general public or not. Therefore if in a law creating a monopoly in favour of State, there is provision for fixation of purchase price of goods, that provision willl be tested under first part of Clause (6) of Article 19, *i.e.*, it shall have to be reasonable and in the interest of general public. In *R.C. Cooper* v. *Union of India*, (1970) 1 S.C.C. 248, a law was passed whereby certain banks were named which were prohibited from carrying on banking business. The Supreme Court held that the assuming of the banking business by the Union or the nationalization of certain banks was not liable to challenge under Article 19 (6) *(ii)*.

In some cases where it is not expedient for the State to carry on a particular business, to the exclusion of citizens, it can employ the services of agents to work on its behalf. The State can delegate the power to carry on the trade or business to a corporation, provided the corporation is owned or controlle by the State itself.

Article 305 which was added by the Constitution (Fourth Amendment) Act, 1955 declares that any law providing for State monopoly shall be protected. Therefore a law creating State monopoly is immune from attack of Articles 301 to 303.

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WRIT JURISDICTION OF SUPREME COURT AND HIGH COURTS

According to the Constitution the Supreme Court of India and the various High Courts in different States can issue writs for the enforcement of Fundamental Rights (Articles 32 and 226). The five writs specifically mentioned, *i.e., habeas corpus, mandamus, prohibition, quo warranto* and *certiorari*, are known as the prerogative writs in English law. These writs have their origin in the Court of King's Bench where the King had prerogative power over his officials for due observance of laws. They were specifically directed to persons or authorities against whom complaints were made and redress sought and were returnable in the Court. Being extraordinary remedies they were issued whenever urgent necessity demanded immediate and decisive interposition by the Court (*Halsbury's Laws of England*, Second Edition, Vol. 9, Page 704).

The powers of the Supreme Court to issue writs are not circumscribed by any territorial limitation. They extend over every authority within India and also authorities functioning outside India under the Control of the Government of India. On the other hand, High Courts have jurisdiction throughout the territories in relation to which they have jurisdiction, to issue writs to any person or authority within those territories only.

Further the power of the High Courts to issue writs is wider than that of the Supreme Court. The Supreme Court can issue writs only for the enforcement of the Fundamental Rights, whereas the High Courts can issue writs for any other purpose also.

Res judicata. Petitions to the Supreme Court and High Courts under Articles 32 and 226 are subject to the rule of *res judicata*. Therefore if a question has been decided by a Court between two parties, the same question cannot be reopened between the same parties [*Daryao* v. *State of U.P.*, A.I.R. (1961) S.C. 1457]. However, writ of *habeas corpus* is an exception to the rule of *res judicata* and *laches*. The doctrine of laches (delay) has been applied by the Supreme Court and High Courts in dismissing petitions on grounds of unreasonable delay. But each case must depend upon its facts and therefore the Courts should look into the the surrounding circumstances and consider the reason for delay.

Locus standi : Who can apply ? The traditional view has been that a petition should only be maintained by a petitioner who himself has suffered some infraction of his rights and is the 'person aggrieved'. However, now with the emergence of the doctrine of public interest litigation, the traditional rule has been relaxed. Now any public spirited citizen or body can file a petition espousing the cause of others who are not in a position to approach the Court themselves.

Types of writs

1. *Habeas corpus.* A *writ of habeas corpus* is in the nature of an order by a Court calling upon the person who has detained another to produce the latter before the Court in order to let the Court know on what ground he has been confined and set him free if there is no legal justification for the imprisonment. The words '*habeas corpus*' literally mean 'to have a body'. An application of *habeas corpus* can be made by any person on behalf of the detained person as well as by the detained person himself. An appeal can be

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to the Supreme Court under Articles 132, 133, 134 or 136 against an order granting or rejecting the application for issue of the writ. The disobedience of the writ of *habeas corpus* issued by the Court is treated as contempt of Court and treated accordingly.

2. *Mandamus*. The word '*mandamus*' literally means a command. The writ of *mandanmus* is a judical remedy which is in the form of an order from a superior Court to any Government, Court, corporation or public authority to do or to forbear from doing some specific act which that body is obliged under law to do or refrain from doing, and which is in the nature of a public duty and in certain cases a statutory duty. It is important to note that the person filing the application for writ of *mandamus* must have a legal right to compel the opponent for performance of his duty. The duty sought to be performed must be of a public nature and also it must be of an imperative nature and not of a discretionary nature. One of the conditions for the grant of the relief of *mandamus* is that there must be a demand for the relief and its refusal by the authority concerned.

Normally, a writ of *mandamus* does not issue to, or an order in the nature of *mandamus* is not made against, a private individual. The writ of *mandamus* does not issue against an executive authority, *i.e.*, the President and the Governors cannot be compelled for the performance of their duties (Article 361).

3. *Prohibition*. A writ of prohibition commands the Court or Tribunal to whom it is issued to refrain from doing something which it is about to do. It is issued by a Superior Court (Supreme Court or High Courts) to an inferior Court or Tribunal. The writ prevents the inferior Court or Tribunal possessing judicial or quasi-judicial powers from assuming or threatening to assume jurisdiction which it does not possess. Thus, the writ lies both in cases of excess of jurisdiction and in absence of jurisdiction. It is issued either before the trial or during the pendency of the trial.

4. *Certiorari*. The writ *certiorari* is an order issued by the Supreme Court or a High Court to an inferior Court or 'body' (exercising judicial or quasi-judicial functions) to have the decisions or acts of such Court or body brought before the Supreme Court or the High Court so that its legality may be investigated. If it is found that the decision is bad, it is quashed or declared invalid and, therefore, it is not binding on the person against whom it has been made. *Certiorari* lies only to judicial decisions and not to acts which are purely administrative or ministerial. A writ of *certiorari* is discretionary ; it is not issued merely because it is lawful to do so. Where the aggrieved party has an adequate alternative remedy, the Court will be slow to entertain the petition for a writ of *certiorari* [*Champalal Binani* v. *Commr. of Income-Tax*, (1971) 3 S.C.C. 20].

The writ of *certiorari* can be issued to a judicial or quasi-judicial body on the following grounds :

(i) Want or excess of jurisdiction.

(ii) Violation of procedure or disregard of principles of natural justice.

(iii) Error of law apparent on the face of the record.

The writs of *prohibition* and *certiorari* are of the same nature, the only difference being that the writ of *prohibition* is issued at an earlier stage, *i.e.*,

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before the order is made, and the writ of *certiorari* is available at a later stage, *i.e.*, after the order has been passed.

5. *Quo warranto.* The term *quo warranto* means 'what is your authority'. The writ of *quo warranto* is used to judicially control executive action in the matter of making appointments to public offices under statutory provisions. The object of the writ is to prevent a person who has wrongfully usurped an office from continuing in that office. The writ calls upon the holder of a public office to show to the Court under what authority is he holding the office in question. If it is found on investigation that he is not entitled to the office, the Court may restrain him from acting in the office and also declare the office to be vacant [*University of Mysore* v. *Govinda Rao*, A.I.R. (1965) S.C.491].

The writ of *quo warranto* lies in respect of a *public office* of a *substantive character* and not a private office. A public office means an office in which the public have an interest. Ordinarily, a writ is issued for the enforcement of a right or performance of a right or performance of a duty at the instance of the aggrieved person. But an application for writ of *quo warranto* challenging the legality of an appointment to an office of a public nature is maintainable at the instance of any private person, although he is not personally aggrieved or interested in the matter as the writ intends to safeguard against the usurpation of public offices [*G. Venateshwara Rao* v. *Govt. of A.P.*, A.I.R. (1966) S.C.828].

DELEGATED LEGISLATION

The exigencies of modern democratic set-up in the world have led to a new development in the field of law-making where only a relatively small part of the total legislative output emanates directly from the Legislature. The bulk of the legislation, known as 'delegated legislation', is being promulgated by the executive. Under this system the Legislature enacts a law covering only the general principles and policies relating to the subject-matter in question, and confers rule-making power on the Government, or on some other administrative agency. The system of delegated legislation has become very popular because it has the advantage of flexibility, elasticity, expedition and opportunity for experimentation.

Classification of legislation. Legislation can be classified as *supreme* or *subordinate*. The supreme legislation is that which proceeds from supreme or sovereign powers in the State and is therefore incapable of being repealed, annulled or controlled by any other legislative authority. Subordinate legislation is that which proceeds from any authority other than the sovereign power, and is, therefore, dependant for its continued existence and validity on some superior or supreme authority. This subordinate legislation may take the form of rules, regulations, bye-laws, orders or notifications, etc. Subordinate legislation must be promulgated and published in some suitable form [*Harla* v. *State of Rajasthan*, A.I.R. (1951) S.C. 467]. In the absence of any statutory requirement as to the mode or form of publication, it should be published in the usual form, *i.e.*, by publication within the country, as generally adopted to notify all the persons the making of rules. In India, publication in the Official *Gazette* and newspapers are the ordinary methods of bringing a rule or subordinate legisaltion to the notice of the person concerned.

Classification of Subordinate Legislation. See Chapter 1.

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Conditional legislation is defined as a statute that provides control but specifies that it is to come into effect only when a given administrative authority finds the existence of the conditions defined in the statute [*Hamdard Dawakhana* v. *Union of India*, A.I.R. (1960) S.C.554].

Restrictions as to delegation of power

Position in England. In England, Parliament is a sovereign body and has unlimited power to make any law, and the Courts cannot question a parliamentary law on any ground. Therefore, Parliament can delegate legislative power to an administrative agency to any extent. There is no restriction on the capacity of Parliament to confer its law-making powers on anybody it pleases and to any extent it pleases. It is not necessary for Parliament to insert in a delegating statute any standard, policy, or norm for guiding the delegate in exercising the power conferred on him. The delegate can evolve his own policy or standards in exercising the delegated power. However, in cases where the delegate misapplies the powers delegated to him, Parliament itself has the power to restrain and control it.

Position in U.S.A. In the United States, the position is substantially different. The U.S.Congress functions under a written Constitution and the U.S. Courts also have the power to declare any statute unconstitutional if it does not conform with the Constitution. The U.S. Supreme Court has invoked the doctrine of *delegatus non potest delegare* which means a delegate (of the people) cannot further delegate its powers. There also prevails the doctrine of separation of powers. But the exigencies of modern government have led to the relaxation of these two doctrines. Now the Congress can delegate legislative powers subject to the rider that it shall itself lay down the standards or policies for the guidance of the delegate and the delegation should not be vagrant and uncontrolled. Therefore, the 'essential legislative functions' cannot be delegated [*Panama Refining Co.* v. *Ryan*, 293 U.S. 388 and *Yakus* v. *U.S.*, 321 U.S.414 (1944)].

Position in India. In India, through a series of decisions the Supreme Court has laid down the principle that the legislature can delegate its legislative power subject to its laying down the policy. The legislature must declare the policy of law, lay down legal principles and provide standards for the guidance of the delegate to promulgate delegated legislation, otherwise the law will be bad on account of 'excessive delegation'. "The legislature cannot delegate its essential legislative function. Legislate it must by laying down policy and principle and delegate it may to fill in detail and carry out policy." [*Registrar, Co-operative Societies* v. *V.K. Kunjabmu.*, A.I.R. (1980) S.C. 350].

Judicial control over delegated legislation

In India, the doctrine of judicial review is very important for the control of delegated legislation. The delegated legislation can be reviewed by the Courts on the following grounds :

(1) *Constitutionality of the parent Act.* If the delegating statute itself is unconstitutional, the delegated legislation emanating thereunder will also be bad.

(2) *Constitutionality of delegated legislation.* The delegating statute may be constitutional, but the emanating delegated legislation may be in conflict with

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some provision of the Constitution. In such a case the delegated legislation is declared void.

(3) *Ultra vire the scope of authority.* The delegated legislation may go beyond the scope of the authority conferred by the State or may conflict with the delegating statute. In this case also the delegated legislation will be struck down by the Court.

TEST QUESTIONS

1. The Indian Constitution is basically Federal in character with striking unitary features. Discuss. *(C.S.E. December 1987, June 1993)*

2. What are the salient features of the Indian Constitution ?

3. Write a note on the Preamble to the Constitution of India.

4. Are Fundamental Rights available to all persons ? Enumerate these Rights.

5. Enumerate the Fundamental Rights in the Constitution of India. Can they be curtailed or suspended ? State the distinction between 'person' and 'citizen' therein.

6. "Democracy without equality is meaningless." How does Indian Constitution guarantee equality to its citizens ? *(C.S.E .December 1986)*

7. Article 19 of the Constitution of India guarantees to the citizens of India six fundamental freedoms. Name them. *(C.S.E , June 1987, June 1992)*

8. Explain the following :

(i) Protection against *ex post facto* laws under Article 20 (1) of the Constitution of India. *(C.S.E. December 1990, June 1992)*

(ii) Ordinance-making powers of the President of India under Article 123 of the Constitution of India. *(C.S.E. December 1990, June 1992)*

9. *(a)* How does the Constitution of India safeguard the life and liberty of a person ? *(C.S.E. December, 1992)*

(b) To what extent can the State restrict the fundamental right to follow any projession ? *(.C.S.E. June 1993)*

10. Discuss the principle of 'equality before the law' in the Indian Constitution and distinguish it from the 'equal protection of laws'.

11. Discuss the nature of and relationship between Fundamental Rights and Directive Principles of State Policy. *(C.S.E. December 1987, 1990)*

12. Point out the distinctions between the Fundamental Rights and the Directive Principles of State Policy. What happens when there is a conflict between them ?

13. Explain briefly the extent to which the Fundamental Rights under the Constitution of India may be amended by Parliament.

14. "Fundamental Rights and Directive Principles of State Policy are complementary to each other." Critically examine.

15. What are the Directive Principles of State Policy under the Indian constitution? Has a citizen any right to enforce the same ?

16. The Directive principles have to conform to and run as subsidiary to the chapter on Fundamental Rights. Discuss.

17. How are the legislative powers distributed between the Union and the States under the Indian Constitution? State the rules of interpretation followed by the Supreme Court of India in interpreting the three lists ? *(C.S.E. June 1991)*

18. An Ordinance is issued by the President of India when Parliament is not in session. State up to what time the Ordinance could remain effective.

19. Write short notes on :

(a) Fundamental Rights of protection of life and personal liberty. *(C.S.E. June 198( )*

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(b) Ordinance-making powers of the President and of the Governers. (C.S.E. December 1989)

(c) Writ of certiorari.

(d) Delegated legislation. (C.S.E. December 1986)

(e) Writ of habeas corpus. (C.S.E. December 1986, June 1988)

(f) Writ of mandamus. (C.S.E. June 1987, December 1988)

(g) Writ of prohibition. (C.S.E. December 1987, 1990)

(h) Method of amending the Constitution. (C.S.E. June 1991)

(i) Freedom of religion in India. (C.S.E. June 1991)

(j) Fundamental duties of citizens of India. (C.S.E. December 1992)

20. Discuss constitutional provisions relating to writ jurisdiction of High Courts and the Supreme Court. Explain briefly the different types of writs.

21. When can Parliament legislate on a subject falling under Lists II and III of Seventh Schedule of the Constitution of India ? What would be the effect of a State legislation when the same is inconsistent with a Parliamentary Legislation ?

22. "State legislatures have the exclusive powers to make laws with respect to the subjects included in the State List and Parliament has no power to encroach on them." Discuss the exceptions to the above statement. (C.S.E. December 1989)

23. State the fundamental freedoms available to citizens of India under the Constitution of India. (C.S.E. June 1990)

24. Write a note on the power of Parliament to make laws on State lists. (C.S.E., June 1989, December, 1991)

25. On what grounds and for what purposes can the freedom of trade, commerce and intercourse within India be restricted?

26 Does a law made by a State to create monopoly rights in favour of a person to carry on any business affect the freedom of trade ?

27. When and how does the Constitution of India permit the Government to restrict freedom of trade and commerce ? (C.S.E. June, 1989, December, 1991)

28. "Equality is the basis of democracy. You cannot have true democracy unless all people are treated as equals." How does our Constitution ensure this? (C.S.E. June 1990)

29. The State of Madhya Pradesh passes a law on a subject included in the 'Concurrent List' which is repugnant to Central legislation on the same subject in certain respects. Discuss its validity. (C.S.E. December 1986)

[**Hint:** Article 254 (1). The law is void to the extent of repugnancy.]

30. The State of Andhra Pradesh passes a law on a matter included in the Concurrent List. The State of Madhya Pradesh also passes a law on the same subject which is imposing lesser burdens as compared to those imposed by the State of Andhra Pradesh. A citizen from Andhra Pradesh challenges the legislation of Andhra Government on the ground that it offends Article 14 of the Constitution of India. Will he succeed ? (C.S.E. December 1987)

[**Hint :** No. Article 246].

31. The State of Andhra Pradesh has a law on a subject enumerated in the Concurrent List. After some time the Parliament also passes an Act on the same subject. State which of the two laws will be applicable in the State of Andhra Pradesh and to what extent ? (C.S.E. June, 1988)

[**Hint** : Both the laws will be applicable, but Andhra Pradesh law will be applicable only to the extent it is *not* repugnant to the Union law].

32. A suit is instituted challenging the validity of a law passed by the State of Andhra Pradesh on the ground that it is inconsistent with the Directive Principles of State Policy. Will it succeed ? (C.S.E. December 1986)

[**Hint :** No. Article 37].

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4

Interpretation of Statutes

A statute is an act passed by the legislative organ of a State. It is the formal expression in writing of the will of the legislative organ. It is a declaration of the law as it exists or as it shall be from the time at which such statute is to take effect. Allen, in his book *Law in the Making* (4th Ed., page 423), states: "A statute is the highest constitutional formulation of law, the means by which the supreme legislature, after the fullest deliberation, expresses its final will." Statute law may be properly defined as the will of the nation, expressed by the Legislature, expounded by Courts of Justice." *(Wilberforce).* Therefore, it follows that the function of a Court is to interpret the statute according to the intent of its framers. However ambiguous or difficult the application of the words in a statute may be, the Court is bound to endeavour to place some meaning upon them.

It is very rare that the word 'statute' is used in the Indian context. The Indian Constitution uses the more common word 'law' and defines it as including any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law [Article 13 (3) *(a)* of the Constitution].

For construction, statutes are commonly divided into following classes :

(1) *codifying*, when they codify the unwritten law on a subject ;

(2) *declaratory*, when they do not profess to make any alteration in the existing law, but merely declare or explain what it is ;

(3) *remedial*, when they alter the common law, or the judge-made (non-statutory) law ;

(4) *amending*, when they alter or amend the statute law ;

(5) *consolidating*, when they consolidate several previous statutes relating to the same subject-matter, with or without alterations of substance ;

(6) *enabling*, when they remove a restriction or disability ;

(7) *penal*, when they impose a penalty or provide for forfeiture of some right or property.

INTERPRETATION

Jolowicz, in his *Lectures on Jurisprudence* (1963 ed., page 280), has divided interpretation in two categories, namely :

(1) legal interpretation ; and

(2) doctrinal interpretation.

A *legal interpretation* is one where the Court is bound to interpret a statute according to set rules of law. In this case, the interpretation of a particular

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statute is prescribed by rules either within that statute or general rules of law, *e.g.*, Monopolies and Restrictive Trade Practices Act, 1965 and Rules made thereunder, Income-tax Act, 1961 and Rules made thereunder, General Clauses Act, 1897. Legal interpretation is further subdivided into two categories :

(a) authentic ; and

(b) usual.

Authentic interpretation is when the rule of interpretation is derived from the statute itself, *i.e.*, from within the four corners of the disputed statute. *Usual interpretation* is when the rule of interpretation is derived from other sources, such as customs, usages, precedents (case law), other statutes, etc.

A *doctrinal interpretation* is wider in scope. Here the Court seeks to discover the purpose behind the statute and finds the real and true meaning of the statute.

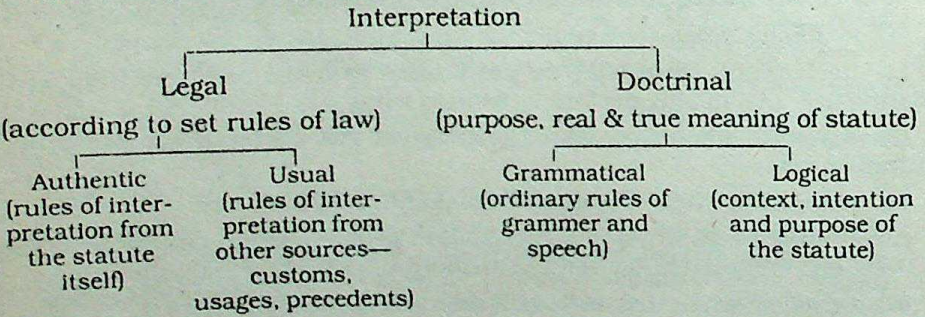
Doctrinal interpretation is also divided into two categories :

(a) grammatical, or

(b) logical.

In *grammatical interpretation* the Court uses ordinary rules of grammar and speech to give meaning to words and expressions used in the statute. In *logical interpretation* the Court often goes beyond the words to find out the context in which they are used. The Court also seeks to discover the intention of the statute and the purpose and real meaning of the statute.

These categories of interpretation are shown in the following Chart :



OBJECT OF INTERPRETATION

Enacted laws (made by competent legislative bodies), specially the modern Acts and Rules, are drafted by legal experts and it is expected that the language used will leave little room for interpretation or construction. But the experience of all those who have to bear and share the task of application and exposition of the law, has been quite different. If all the words and expressions used in various Acts were clear and unambiguous, the Courts would not be crowded with cases regarding the right interpretation of law. The reality, however, is that Courts and lawyers are busy in unfolding the meanings of ambiguous words and expressions and resolving inconsistencies. This has led to the development of certain rules of interpretation or construction.

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On the need for statutory interpretation, it has been held by Denning, L.J. in *Seaford Court Estates Ltd* v. *Asher*, (1949) 2 K.B. 481 that it is not within human powers to foresee the manifold sets of facts which are present or which may arise in future ; and even if they are in contemplation, it is not possible to provide for all of them in a language which is absolutely clear and unambiguous. Language itself has an inherent quality whereby words can have different meanings. It is not, and cannot be, precise and concise like mathematical figures. Therefore, it is left to the Courts to find out the intention of the Legislature from the language of the statute, the social conditions which led to the enactment of the statute and mischief whose remedy it seeks to provide and then give force to the true intention of the Legislature. A judge must not alter the material of which a statute is woven, but he can and should iron out the creases.

Interpretation and construction

"By interpretation or construction is meant" says Salmond, "the process by which the Courts seek to ascertain the meaning of the Legislature through the medium of authoritative forms in which it is expressed." (*Jursprudence*, 11th ed., p. 152).

The object of all interpretation of a written document is to discover the intention of the author, the written declaration of whose mind the document is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as possible, and as the law will permit.

As explained by Cooley : "Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text ; conclusions which are in the spirit though not within the letter of the law." (*Constitutional Limitations*," Vol. 1, p. 97).

But in common usage interpretation and construction are usually understood as having the same significance, and are used as synonymous terms (*United States* v. *F.W.Keitel*, 211 U.S. 370).

GENERAL PRINCIPLES OF INTERPRETATION

Modern enacted laws leave very little room for interpretation or construction by the Courts. The duty of the Courts is to act upon the true intention of the Legislature—the *mens* or *sententia legis*. If a statute is open to more than one interpretation, the Court has to choose that interpretation which represents the true intention of the Legislature. It is in cases where the intention of the Legislature is not clear in the statute, that the Courts take help from certain rules of interpretation which have been formulated after a lot of deliberation. Some of the important rules of interpretation which are used by our Courts are as follows :

1. PRIMARY RULES OF INTERPRETATION

1. The rule of literal construction

Adherence to plain grammatical meaning. The words of a statute are first understood in their natural, ordinary or popular sense. The phrases and

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sentences are construed (interpreted) according to their grammatical meaning, unless it leads to some absurdity. This is the rule of literal construction. This rule often known as the "Golden Rule of Construction" advocates adherence to the plain and grammatical meaning to words and phrases used in a statute.

Absurdity and inconsistency to be avoided. In construing statutes, the grammatical and ordinary sense of the words used in the statute is adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the statute, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further.

Context not to be ignored. Whenever a statute is being construed, it is not to be construed according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words in the context with the subject-matter with regard to which they are used.

"No word", says Professor H.A. Smith, "has an absolute meaning, for no word can be defined *in vacuo*, or without reference to some context." In the words of Justice Holmes " a word is not crystal, transparent and unchanged ; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and time in which it is used." [*Towne v. Eisner*, (1917) 245 U.S. 418 ; also quoted in *Keshavananda Bharti* v. *State of Kerala*, A.I.R. (1973) S.C. 1461]. Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is "What is the natural or ordinary meaning of that word or phrase in its context in the statute ?"

Scientific and technical language in a statute. In cases of technical legislation, the words acquire technical meanings and hence have to be interpeted accordingly. The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning, and the second is that the phrases and sentences are to be construed according to the rules of grammar [*R.* v. *Commissioner* of *Income-tax*, (1888) 22 Q. B.D. 296].

In the recent case of *TELCO* v. *State*, A.I.R. (1989) Pat. 23 the Court held that general statutes will *prima facie* be presumed to use words in their obvious and popular sense so far as the scientific and technical language in a statute is concerned. If the statute is with reference to a particular trade, business or transaction, then the words used therein which everybody conversant with that trade, business or transaction knows and understands to have particular meaning of it, should be construed as having that particular meaning which may differ from the ordinary or popular meaning.

Omissions not to be inferred. It is a corollary to the general rule of literal construction that nothing is to be added to, or taken from, a statute unless there are adequate grounds to justify the inference that the Legislature intended something which it omitted to express. "We are not entitled, " said Lord Loreburn L.C., " to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself." [*Vickers, Sons & Maxim Ltd.* v. *Evans*, (1910) A.C. 44].

Every word in a statute to be given a meaning. A construction which would leave without effect any part of the language of a statute will normally be

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rejected. Effort should be made to give meaning to each and every word used by the Legislature. "It is not a sound principle of construction to brush aside words in a statute as being inapossite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute." [*Aswini Kumar Ghose* v. *Arabinda Bose*, A.I.R. (1952] S.C. 369). In the interpretation of statutes the Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. The Legislature is deemed not to waste its words or to say anything in vain.

Similarly, the part of a Section in an Act must not be construed in such a way as to render a proviso to that Section redundant [*Irving* v. *National Provincial Bank Ltd.*, (1962) 2 Q. B. 73].

2. Rule of reasonable construction, *i.e., Ut res magis valeat quam pereat*

Broader interpretation if narrower interpretation fails to achieve purpose. Sometimes the choice is between two interpretations or constructions, the narrower and the broader or bolder. If the narrower interpretation would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility. In such a case, we should rather accept the broader or bolder construction based on the view that the Legislature would legislate only for the purpose of brining about an effective result. A construction should be rejected if it results in hardship, serious inconvenience, injustice, absurdity or anomaly. It should also be avoided if it leads to inconsistency or uncertainty and friction in the system which the statute purports to regulate. Preference should be given to that construction which avoids such results and is consistent with the smooth working of the system [*K.P. Verghese* v. *Income-tax Officer*, A.I.R. (1981) S.C. 1922].

Meaning put on words must advance remedy and suppress mischief. A statute or any provision therein must be so construed as to make it effective and operative on the principle expressed in the maxim : *ut res magis valeat quam pereat.* It means that the words of a statute must be construed so as to give a sensible meaning to them. In following this principle the Courts can depart from the dicitonary meaning of a word and give it a meaning which will advance the remedy and suppress the mischief. A construction will be adopted in accordance with the policy and object of the statute. If the *litera legis*, *i.e.*, the letter of the law, is not clear, interpretation must be *ratio legis*, *i.e.*, according to the purpose, policy, object or spirit of the law.

3. The mischief rule or Heydon's rule of interpretation

Suppress mischief and advance remedy. When the material words in a statute are capable of bearing two or more constructions, one of the most firmly established rule of construction of such words is the rule laid down in *Heydon's case*, (1584) 3 Co. Rep. 7, which has attained the status of a classic [*Kanailal Sur* v. *Paramnidhi Sadhukhan*, A.I.R. (1957) S.C. 907]. In *Heydon's case* it was held 'that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), the following four points are to be considered :

(1) What was the Common Law before the making of the Act ?

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(2) What was the mischief and defect for which the Common Law did not provide ?

(3) What remedy hath the Parliament presribed to cure the disease of the Common Law ?

(4) And what was the true reason of the remedy ?

And then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief.

In a well known English case, Sec. 1 (1) of the Street Offences Act, 1959 (an English Act) made soliciting 'in a street' by prostitutes an offence. It was held that even if the prostitutes solicited from the balconies or windows and attracted the attention of the passers by, they were committing the offence [*Smith* v. *Hughes*, (1960) 1 W.L.R. 830].

In *Bengal Immunity Co.* v. *State of Bihar*, A.I.R. (1955) S.C. 661, the Supreme Court, after referring to the state of law prevailing in the provinces prior to the Constitution, applied the mischief rule in construction of Article 286 (which deals with 'Restriction as to imposition of tax on the sale or purchase of goods') of the Constitution. The Court also referred to the chaos and confusion that was brought about in inter-State trade and commerce by the different provincial Legislatures founded on the theory of territorial nexus. It was held that "it was to cure this mischief of multiple taxation and to preserve the free flow of inter-State trade and commerce in the Union of India regarded as one economic unit without any provincial barrier that the Constitution makers adopted Article 286 in the Constitution."

In applying the rule in *Heydon's case*, it is important to remember that the recourse to the object and policy of a statute or the consideration of the mischief and defect which the statute purports to remedy is only permissible when the language is capable of two constructions. Where the language is capable of bearing only one construction, the rule in *Heydon's case* ceases to be controlling and gives way to the plain-meaning rule [*Commr. of Income-tax, M.P. & Bhopal* v. *Sodra Devi*, A.I.R (1957) S.C. 832].

4. Rule of harmonious construction

Provisions in an Act to be reconciled. A statute must be read as a whole and any one provision of the statute should be construed with reference to other provisions in the same statute so as to make a consistent enactment of the whole statute. The rule of construction is well-settled that when there are in a statute two provisions which cannot be reconciled with each other, they should be so interpreted that, if possible, effect should be given to *both*. This is what is known as the rule of harmonious construction. That effect should be given to both, is the very essence of the rule. Thus a construction that reduces one of the provisions to a 'useless lumber' or a 'dead letter' is not harmonious construction [*Calcutta Gas Co. (Proprietary) Ltd* v. *State of W.B.*, A.I.R. (1962) S.C. 1044). To harmonise is not to destroy [*J.K. Spinning & Weaving Mills* v. *State of U.P.*, A.I.R. (1961) S.C. 1170].

It is duty of the Court to avoid 'a head-on clash' between two Sections of the same statute. The Court should construe provisions which appear to conflict so that they harmonise [*Raj Krishna* v. *Binod Kanungo*, A.I.R. (1954) S.C. 202]. It should not be lightly assumed that "Parliament had given with one hand

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what it took away with other." [*K.M Nanavati* v. *State of Bombay*, A.I.R. (1961) S.C. 112. The provisions of one Section of a statute cannot be used to defeat those of another ; therefore, Sections and Sub-Sections of an Act must be read as parts of an integral whole and as being interdependent.

The more general provisions to be construed to exclude the more specific provision. The rule of harmonious construction is evidenced in two Latin maxims also—*Generalia specialibus non derogant* (general things do not derogate from special things) and *generalibus specialia derogant* (special things derogate from general things). In cases where there are two conflicting provisions, it should be found out which of the two apparently conflicting provisions is more general and which is more specific. The more general one shall be construed so as to exclude the more specific one.

The priniciple of harmonious construction is also applicable in construction of provisions of subordinate legislation and the parent Act.

5. Ejusdem generis.

Ejusdem generis literally means 'of the same kind or species'. When particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. In other words, the general expression is to be read as comprehending only things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended.

The rule of *ejusdem generis* applies when

(1) the statute contains an enumeration of specific words ;

(2) the subjects of enumeration constitute a class or category ;

(3) that class or category is not exhausted by the enumeration ;

(4) the general terms follow the enumeration ; and

(5) there is no indication of a different legislative intent [*Amar Chandra* v. *Collector of Excise, Tripura*, A.I.R (1972) S.C. 1863]. If the subjects of enumeration belong to a broad based genus as also to a narrower genus, there is no principle that the general word should be confined to the narrower genus [*Uttar Pradesh S.E. Board* v. *Harishanker*, A.I.R. (1979) S.C. 65].

The rule of *ejusdem generis* has to be applied with care and caution. It is not an inviolable rule of law. Where the context, object and mischief of the enactment do not require restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give those words their plain and ordinary meaning [*Lilawati Bai* v. *State of Bombay*, A.I.R. (1975) S.C. 521].

II. OTHER RULES OF INTERPRETATION

1. *Expressio unius est personae vel rei est exclusio alterious*

The rule literally means that express mention of one thing implies the exclusion of another. In other words, mention of one or more things of a particular class may be regarded as silently excluding all other members of the class. Further, where a statute uses two words or expressions, one of which generally includes the other, the more general term is taken in a sense

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excluding the less general one : otherwise there would have been little point in using the latter as well as the former.

The word 'land' is generally understood as including buildings, but if, after imposing a rate on houses, buildings, works, tenements and hereditaments, an Act exempted 'land', this word would be restricted to land unburdened with houses, buildings or works which would otherwise have been unnecessarily enumerated [*R.* v. *Midland Rail Co.*, (1855) 4 E. & B. 958].

The rule of *expressio unis est exclusio alterius* may not always provide the answer to problems of construction. It is often a valuable servant, but a dangerous master to follow in the construction of statutes. The *exclusio* is often the result of inadvertance or accident, and in these cases the maxim ought not to be applied when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

2. *Contemporanea expositio est optima et fortissima lege*

Contemporaneous exposition is the best. The rule literally means that a contemporaneous exposition is the best and strongest in law. It is said that the best exposition of a statute or any other document is that which it has received from contemporary authority. The language of a statute must be understood in the sense in which it was understood when it was passed. Those who lived at or near the time when the statue was passed may reasonably be supposed to be better acquainted than their decendants with the circumstances to which it had relation as well as the sense then attached to legislative expressions. Moreover, a uniform notorious practice continued under an old statute and inaction of the Legislature to amend the same show that the practice so followed was based on correct understanding of the law.

The principle of *contemporanea expositio* is not applicable to a modern statute [*Raja Ram Jaiswal* v. *State of Bihar*, A.I.R. (1964) S.C. 828]. The doctrine is confined to the construction of ambiguous language used in very old statutes where indeed the language itself might have had a rather different meaning in those days. But if the statute appears to be capable of only one interpretation, the fact that a wrong meaning had been attached to it for many years will be immaterial.

3. *Noscitur a sociis*

Words take colour from each other. The rule literally means that 'a word is known by its associates'. In other words, the meaning of a word is to be judged by the company it keeps. It is a legitimate rule of construction to construe words in a statute with reference to words found in immediate connection with them. Where two or more words susceptible of analogous meaning are coupled together, they are understood in their cognate sense. They take their colour from each other, that is, the more general is restricted to a sense analogous to the less general. It is only where the intention of the Legislature in asssociating wider words with words of narrower significance is doubtful that this rule of construction can be usefully applied.

In construing the word 'declare' in the phrase 'to create, declare, assign, limit or extinguish' as it occurs in Sec. 17 of the Indian Registration Act, 1908, the Privy Council held that though the word 'declare' was capable of bearing a wider meaning but in Sec. 17 being in association with other words, like

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'create', 'limit' or 'extinguish' its meaning is restricted to connote a definite change of legal relationship as distinct from a mere statement of facts [*Bageshwari Charan Singh* v. *Jagannath*, A.I.R. (1932] P.C. 55). Similarly in construing Article 194 (3) of the Constitution which refers to powers, privileges and immunities of a House of the Legislature of a State, the Supreme Court said that the word 'powers' must take its colour from words in immediate connection with it and that it should be construed to refer not to legislative powers but to powers of a House which are necessary for the conduct of its business [*State of Karnataka* v. *Union of India*, A.I.R. (1978) S.C. 68].

It is also a fundamental rule of construction that the *same words bear the same meaning in the same statute.* But this rule will not apply—

(i) when the context expressly excludes particular meaning ;

(ii) when there is sufficient reason to construe word in one part of a statute in a different sense from that which it bears in another part of the statute ;

(iii) where it would cause injustice or absurdity ;

(iv) where different circumstances are being dealt with ; and

(v) where the words are used in different context.

Strict and liberal construction

Strict construction. The words of a statute are to be construed in the manner in which they are stated in the Act. The statute is not to be regarded as including anything which is not within its letter and spirit and which is not clearly and manifestly described in the words of the statute itself. The use of the rule of strict construction is more in construction of penal statutes. The words of a penal statute which create an offence or prescribe punishment are construed very strictly. In a case where an enactment made it a felony to 'stab, cut or wound', it was held that a case of biting off a nose or finger was not covered because the injury thus inflicted was not (as the words seemed to require) caused by an instrument [*R.* v. *Jeans*, (1844) 1 C. & K. 539].

Liberal construction. Where the usual meaning of the words falls short of the object of the Legislature, a more extended meaning may be attributed to them, if they are fairly susceptible of it. This relaxation of strictly literal principles of construction is also known as *beneficial construction.* It has been held in many cases. that it is the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy. "It is always proper," said Lord Reid "to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction." [*Gartside* v. *Inland Revenue Commr.*, (1968) A.C. 553].

If the words used in a statute are plain and unambiguous, the Court is bound to construe them in their ordinary sense and give them full effect disregarding consequences thereof. The plea of inconvenience and hardship is dangerous. However, if the words are ambiguous and obscure the Court can attempt to discover the intention and the purpose of the statutory provision. In such cases, liberal, rather than literal, construction is permissible. There are several cases of the Supreme Court in which liberal interpretation of welfare legislations has been preferred taking into consideration the legislative intention underlying the statutory provision. In such cases, the

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rule of literal interpretation has been discarded and the rule of liberal or rational interpretation has been adopted.

INTERNAL AND EXTERNAL AIDS OF INTERPRETATION

In constructing the provisions of a statute, the Courts take help from various elements which may be part of the statute itself or which may be extraneous but related to the statute. There are two kinds of aids available to the Courts :

1. *Internal aids.* Besides its ordinary sections, a statute has a number of other parts which have an effect on the sections, like the title, preamble, headings, provisos and schedules, etc.

2. *External aids.* There are many factors which have an effect on a statute and its interpretation like its legislative history, parliamentary debates, reports of committees, etc.

1. Internal aids

(1) **Title.** Nearly all modern statutes or Acts have both a long and a short title. The *long title* is set out at the head of the statute and gives a fairly full description of the general purpose, object and scope of the Act. It is now settled that the long title of an Act is a part of the Act and it is legitimate to use it for the purpose of interpreting the Act as a whole, and ascertaining its scope. But the long title of an Act is looked at only to help resolve an ambiguity, and "may not be looked at to modify the interpretation of plain language". [*Re Wykes*, (1961) Ch. 229].

The *short title* of an Act, often referred to as the statutory nickname, is simply for ease of reference to that Act. It obviates the necessity of always referring to the Act under its full and descriptive title. Its object is identification and not description. The short title is generally not taken into account while construing a statute.

(2) **Preamble.** The preamble of an Act like the long title expresses the scope, object and purpose of the Act. It is more comprehensive than the long title. It may recite the purpose and cause of making the statute, the evils sought to be remedied or the doubts which may be intended to be settled.

Regarding the importance and utility of the preamble in construing an Act it has been held by the Supreme Court in *Burrakur Coal Co.* v. *Union of India*. A.I.R. (1961) S. C. 954 that "it is one of the cardinal principles of construction that where the language of an Act is clear, the preamble must be disregarded though, where the object or meaning of an enactment is not clear, the preamble may be resorted to explain it."

(3) **Headings.** The headings prefixed to sections or sets of sections are regarded as preambles to those sections, *e.g.*, in the Constitution of India, Part II talks of Citizenship, Part III of Fundamental Rights, Part XIII of Freedom of Trade and Commerce. The headings can be used in construing the provisions of an Act, but only in cases where the enacting words are ambiguous. They cannot be used to give a different effect to clear words in section which have a plain and ordinary meaning [*Commr. of Income-tax* v. *Ahmedbhai Umarbhai*, A.I.R. (1950) S.C. 134].

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(4) **Marginal notes.** Marginal notes are often found printed at the side of the sections in an Act. They purport to summarise the effect of the sections and have sometimes been used as an aid to construction. But the weight of the authorities is to the effect that they are not parts of the statute and so should not be considered [*Sutton* v. *Sutton*, (1883) 22 Ch. D. 511].

In *Chandraji Rao* v. *Commr. of Income-tax*, A.I.R. (1970) S.C. 158, it has been held by the Supreme Court that there can be no justification for restricting a section by the marginal note. The marginal note cannot certainly control the meaning of the body of the section if the language employed therein is clear and unambiguous.

(5) **Interpretation clauses.** Interpretation clauses or the definition sections (as more popularly known) are found in almost all Acts. The definition sections contain definition of certain words and expressions which are used in the same statute in the latter part. The definition sections facilitate in finding the meaning of and the context in which the particular words defined have been used. They also avoid the necessity of frequent repetitions in describing the subject-matter to which the words or expressions so defined are intended to apply.

The purpose of the definition sections is either to give the definition of words in a way restrictive of their ordinary meaning or extensive of their ordinary meaning.

Means. Wherever the word 'means' is used to define a word, the definition is *prima facie* restrictive and exhaustive.

Includes. Wherever the word 'includes' is used to define a word, the definition is *prima facie* extensive.

Means and includes. Further if the words 'means and includes' are used together, it is indicative that the definition is exhaustive. And if the words 'to apply to and include' are used, the definition is extensive.

Inclusive and exclusive definitions: The definition may be both inclusive and exclusive. It may include certain things and also expressly exclude several other things. Such definition is also exhaustive. For example, the definition of 'wages' in Sec. 2 *(vi)* of the Payment of Wages Act, 1936, is both inclusive and exclusive.

Deemed to include. In some cases a legal fiction is created and a word is deemed to mean something which it actually does not, in its ordinary sense, mean. The words used in such definitions are 'is deemed to include'. This is obviously an inclusive definition because the legal fiction will embrace only that area to which it is made to extend.

Definition to be construed in the light of general purpose of the Act. Although it is normally presumed that the Legislature will and should be specially precise and careful in its choice of language in the definition section, at times the language used in such a section itself requires interpretation. In cases of uncertainty or doubt the definition should be construed in the light of the general purpose of the Act . For example, the definition of the word 'industry' in the Industrial Disputes Act, 1947, prior to its amendment in 1982, was so ambiguous that it had defied analysis. Instead of promoting precision and rounding of blurred edges, it achieved the opposite [*Bangalore Water Supply Sewerage Board* v. *Rajappa*, A.I.R. (1978) S.C. 548].

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Unless the context otherwise requires. When a word is defined in the interpretation clause, that definition generally governs whenever that word is used in the body of the statute. But where the context makes the definition given in the interpretation clause inapplicable, the defined word used in the body of the statute may have to be given a different meaning. In such cases the definition in the interpretation clause generally contains the phrase 'unless the context otherwise requires'. Even in the absence of an express qualification to that effect, such a qualification is always implied [*Knightsbridge Estates Trusts Ltd.* v. *Byrne*, (1940) A.C. 613].

(6) **Provisos.** When the Legislature wants to carve out some portion from the subject-matter of a section in an enactment, it adds a clause which is called a proviso to the main provision. The normal function of a proviso is to *except* something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment [*Kedarnath Jute Manufacturing Co. Ltd.* v. *Commercial Tax Officer*, A.I.R. (1966) S.C. 12].

The language of a proviso even if general is normally to be construed in relation to the subject-matter covered by the section to which the proviso is appended. Further, if the enacting portion of a section is not clear a proviso may give an indication as to its true meaning.

In *Madhu Gopal* v. *Addl. District Judge*, A.I.R. (1989) S.C. 155, it has been held that it is a well settled principle of construction that unless clearly indicated, a proviso would not take away any substantive rights given by the section or the sub-section.

Proviso, exception and saving clause. 'Proviso' is used to remove special cases from the general enactment and provide for them specially ; 'Exception' is intended to restrain the enacting clause to particular cases ; and 'Savings clause' is used to preserve from destruction certain rights, remedies or privileges already existing.

(7) **Illustrations.** Illustrations are examples appended to a section forming part of the statute. Although forming no part of the section, illustrations are of relevance and value in the construction of the text of the section and they should not be readily rejected as repugnant to the section. But illustrations cannot have the effect of modifying the languge of the section and they cannot either curtail or expand the ambit of the section which alone forms the enactment [*Shambhu Nath Mehra* v. *State of Ajmer*, A.I.R. (1956) S.C. 404].

(8) **Explanations.** An explanation is at times appended to a section to explain the meaning of some words contained in the section. It is a part and parcel of the statute.

An Explanation may be added to include something within or to exclude something from the ambit of the main enactment or the connotation of some word occurring in it [*Controller of Estate Duty* v. *Kantilal Trikamlal*, A.I.R. (1976) S.C. 1935]. It should be read in a manner to clear up any ambiguity in the main section and should not try to widen the scope of the section.

An Explanation is generally a clarification of the legislative mind ; it can never be construed as an expression of any change of mind by the Legislature. It only says what the Legislature meant in the main enactment. In *G. Sriramulu Naidu* v. *CTO*, (1975) 35 STC 531 (A.P), it was observed that "an

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Explanation is quite different in nature from from a proviso, for the latter excepts, excludes and restricts, while the former explains, clarifies or subtracts or includes something by introducing a legal fiction."

(9) **Schedules.** Schedules appended to a statute form part of it. They are added towards the end and their use is made to avoid encumbering the sections in the statute with matters of excessive detail. They often contain details and forms for working out the policy underlying the sections of the statute. Occasionally they contain such rules and forms which can be suitably amended to suit local or changing conditions by a process simpler than the normal one required for amending other parts of the statute.

The division of a statute into sections and schedules is a mere matter of convenience and a schedule therefore may contain substantive enactment which may even go beyond the scope of a section to which the schedule may appear to be connected by its heading.

If there is any appearance of inconsistency between the schedule and the enactment, the enactment shall prevail. If the enacting part and the schedule cannot be made to correspond, the latter must yield to the former [*Ramchand Textile* v. *Sales Tax Officer*, A.I.R. (1961) All. 24].

(10) **Statement of objects and reasons.** Reliance can be placed on the statement of objects and reasons for construction of a provision in the statute only where the clauses of the statement of objects and reasons have been incorporated in the Act without any changes.

The fact that Parliament has passed the provisions of the statement of objects and reasons gives sanction to them and they are a valid aid to construction of provisions. But where the clauses undergo extensive changes during the passage of the Bill in Parliament, it is unsafe to rely on them.

2. External aids

There are many factors which lead to the final enactment of a statute. Apart from the internal aids like the title, preamble, headings, etc., the Courts may take help from extrinsic or external aids for construction of ambiguous words in a statute. The Courts are entitled to consider such external or historical facts as may be necessary to understand the subject-matters to which the statute relates, or to have regard to the mischief which the statute is intended to remedy. As such the reports of the commissions preceding a statutory measure have often been admitted as evidence of 'surrounding circumstances' with reference to which the words in the statute are used [*Assam Railways* v. *Inland Revenue Commr.*, (1934) All E.R. 646 (H.L.)].

(1) **Parliamentary history.** Parliament history is the process through which a Bill undergoes before it becomes an Act, right from the conception of the idea to the passing of the Act. It includes the rough draft of the Bill, the debates made, the amendments proposed, etc. The Courts have used this aid in many cases in resolving the questions of construction.

Debate on a Bill. Regarding speeches made in the course of the debate on a Bill the Supreme Court has held that they cannot be used as an extrinsic aid to construction of the Act because the speeches are only indicative of the subjective intent of the speaker. Further the speaker does not speak unanimously for the House [*State of Travancore* v. *Bombay Co. Ltd.*, A.I.R. (1952)

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S.C. 365]. In *A.K. Gopalan* v. *State of Madras*, A.I.R. (1950) S.C. 27, the Supreme Court has held that the debates can be referred to exclude a particular meaning being attached to a word. The debate shows that the word was up for consideration with reference to what has been incorporated in the Act.

Amendments. The amendments considered during the progress of a Bill have also been held to be inadmissible for the purposes of construction of an Act. But in *Express Newspapers (Pvt.) Ltd.* v. *Union of India*, A.I.R. (1958) S.C. 578, the Supreme Court held that in case where the terms of the Act are ambiguous or vague, resort may be had to the amendments which were considered, for the purpose of arriving at the true intention of the Legislature.

(2) **Historical facts and surrounding circumstances.** The Court, is entitled to take into account "such external or historical facts as may be necessary to understand the subject-matter of the statute" or to have regard to "the surrounding circumstances" which existed at the time of the passing of the statute [*R.L. Arora* v. *State of U.P.*, A.I.R. (1964) S.C. 1230].

The subject-matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act. But like any other aid, internal or external, inferences from historical facts and surrounding circumstances must give way to clear language of statutory provisions.

(3) **Reference to reports of Committees.** Many times the Legislature appoints Committees to find in detail some facts which is not possible for it to do. These Committees consist of experts specialised in various fields, who give their report which is then considered by the Legislature. The recommendations of the Committees are not mandatory in nature. When Legislature has enacted a statute as recommeded by the report of a Committee and there is ambiguity or uncertainty in any provision of the statute, the Court may have regard to the report of the Committee for ascertaining the intention behind the provision [*Davis* v. *Johnson*, (1978) 1 All E.R. 1132 (H.L.)]. But where the words used are plain and clear, no intention other than what the words convey can be imported in order to avoid anomalies [*Mithilesh Kumari* v. *Prem Behari Khare*, A.I.R. (1989) S.C. 1247].

(4) **Later social, political and economic developments and scientific inventions.** Reference to the circumstances existing at the time of the passing of a statute does not mean that the language used, at any rate, in a modern statute, should be held to be inapplicable to social, political and economic developments or to scientific inventions not known at the time of the passing of the statute. Legislative standards are generally couched in broad terms. Therefore a statute may be interpreted to include circumstances or situations which were unknown or did not exist at the time of the enactment of the statute [*Vishnu Agencies (Pvt.) Ltd.* v. *Commercial Tax Officer*, A.I.R. (1978) S.C. 449].

It has been held that telephone is 'telegraph' within the meaning of that word in the Telegraphs Act, 1863 and 1869 (these are English Acts), although telephone was not invented in 1869 [*Attorney General* v. *Edison Telephone Co. of London*, (1880) 6 Q.B.D. 244]. Similarly, an electric train car is a stage carriage within the meaning of the Stage Carriage Act, 1832 (this is an English Act) [*Chapman* v. *Kirke*, (1948) 2 All E.R. 556].

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(5) **Reference to other statutes.** A statute must be read as a whole as words are to be understood in their context. Extension of this rule of context permits reference to other statutes in *pari materia*. Statutes are in *pari materia* which relate to the same person or thing, or to the same class of persons or things. It is a phrase applicable to public statutes or general laws made at different times and in reference to the same subject. When the two pieces of legislation are of differing scopes, it cannot be said that they are in *pari materia*.

Use of some words in similar connection in a later statute gives rise to a presumption that they are intended to convey the same meaning as in the earlier statute. Once the words receive an authoritative exposition by a superior Court and the same words are used in the same context, it means that the Legislature wants to continue with the same interpretation.

However, it is not a sound principle of construction to interpret words used in one Act with reference to another Act, when the two Acts are not in *pari materia* [*Mohanlal* v. *R. Kandiah*, A.I.R. (1979) S.C. 1132]. Further, when there is no ambiguity in the statute, it may not be permissible to refer to, for purposes of its construction, any previous legislation or decisions rendered thereunder [*State of Punjab* v. *Okara Grain Buyers Syndicate Ltd., Okara*, A.I.R. (1964) S.C. 669).

(6) **Dictionaries.** When a word or expression is not defined in any statute, the Court is entitled to refer to dictionaries to find out the meaning of the word or expression in common parlance [*Bolani Ores Ltd.* v. *State of Orissa*, A.I.R. (1975) S.C. 17]. But a word may have many meanings as given in a dictionary. It is, therefore, important to remember the fundamental rule that the true meaning of a word or expression is the meaning in the context in which it is used. Meanings of words take colour from the context in which they appear [*Kanwar Singh* v. *Delhi Administration.*, A.I.R (1965) S.C.. 871].

Meaning of words expounded in earlier judicial decisions in cases of similar statutes are preferred to dictionary meaning. But in all cases the fundamental rule still remains the same that if the meaning of a word is clear and unambiguous or can be gathered from within the four corners of the Act itself, no help from dictionaries should be sought.

(7) **Use of foreign decisions.** Indian Courts have time and again taken help from foreign decisions. But this is only in cases where the same system of jurisprudence is followed and that too only regarding similar statutes. The assistance of such decisions is subject to a qualification that prime importance is given to the language of the relevant provisions in the Indian statute, the circumstances and setting in which the law is enacted and the Indian conditions. In other words, "statutory construction must be homespun even if hospitable to alien thinking" [*Bangalore Water Supply & Sewerage Board* v. *Rajappa*, A.I.R (1978) S.C. 549].

Where language of an Act is clear and applicable, no question of relying on foreign authorities arises. But in cases of doubt, assistance is sought from foreign decisions, mostly English, for two reasons, viz. :

(a) many Indian Acts are modelled on prior English Acts, and

(b) apart from common link of English Common Law and Jurisprudence and similarity of political thought the use of English language is authoritative text of Indian statutes.

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PRESUMPTIONS

The need for presumptions arises only when the meaning of a statute or intention of the Legislature is not clear or manifest. In the absence of these, the following presumptions would arise :

1. That the Legislature, while enacting a law,

(a) knows the state of law and does not intend to make any substantial alteration in the law beyond what it expressly declares either in express terms or by clear implication, or in other words, beyond the immediate scope and object of the statute,

(b) confers powers necessary to carry out duties imposed by it,

(c) does not make a mistake,

(d) uses words in a statute precisely and not loosely,

(e) does not compel any one to do that which is futile,

(f) does not alter the existing law unless there is an express enactment,

(g) does not intend a statute to be inconsistent with the principles of international law,

(h) does not intend a criminal liability to attach without guilty intent or mind,

(i) does not intend the State to be affected without an express provision in the statute,

(j) does not intend to take away the vested rights of a person *(i.e.,* rights which he had at the time the statute was passed) wihout an express provision to that effect or without compensation,

(k) intends that the powers conferred by a statute would be exercised fairly and impartially.

2. That the doctrine of natural justice would apply for the interpretation of statutes.

3. That a consolidating Act does not alter the law contained in the Acts it replaces unless the language of the consolidating Act is clearly different from the previous Acts.

4. That an accused is innocent unless proved to be guilty. This rule applies mosIty in criminal law.

5. That the negative language of a statute often gives rise to the presumption that the statute is mandatory.

6. That in taxation laws a tax liability cannot be imposed unless express language is used in the statute.

TEST QUESTIONS

1. Explain briefly the general principles of interpretation. What is the object behind interpretation of statutes ?

2. What is the need for interpretation of statutes ? What are the internal and external aids to interpretation ?

3. "External aids in interpretation of statutes have to be used with great caution and sparingly too." Comment . *(C.S.E. December 1992)*

4. Explain in brief the rule of *ejusdem generis* for the interpretation of statutes. *(C.S.E. December 1987)*

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5. Discuss the primary rule of interpretation. *(C.S.E. June 1992)*

6. What is the necessity of presumptions in the interpretation of statutes. *(C.S.E. December 1991)*

7. Discuss the rule of Reasonable Construction.

8. "When the words of a statute are clear and unambiguous there is no need for any aid to interpretation." Discuss with special reference to importance of the preamble and marginal notes of an Act.

9. Explain in brief the Mischief Rule or Heydon's Rule of Interpretation. *(C.S.E. June 1990; 1988)*

10. Explain in brief the internal aids in the interpretation of statutes. *(C.S.E. December 1988, June, 1991)*

11. Write short notes on :

(a) Golden rule. *(b)* Harmonious construction. *(c) Noscitur a Sociis.* *(d)* Reference to other statutes as an external aid to interpretation. *(e)* Mischief Rule. *(f)* Difference between construction and interpretation. *(g)* Pith and substance rule. *(C.S.E. December 1989)*

12. Discuss the rule of *ejusdem generis.* *(C.S.E. June 1993)*

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The Code of Civil Procedure, 1908

In every civilised society, there are two sets of laws, *viz.*,

(1) substantive laws, and

(2) procedural laws (also known as adjective laws).

Substantive laws determine the rights and obligations of citizens. *Procedural laws* prescribe the procedure for the enforcement of such rights and obligations. Of the two, substantive laws are no doubt the more important. But the efficacy of substantive laws, to a large extent, depends upon the quality of procedural laws. Unless the procedure is simple, expeditious and inexpensive, the substantive laws however good, are bound to fail in their purpose and object. Procedure (with its rules) is the handmaid and not the mistress of justice.

Procedure is a means to justice. Any system of procedure must subserve the ends of justice. Procedure is a means, and not an end. When the means assume undue prominence, and the end is lost sight of, or even sometimes apt to be defeated in the process, citizens affected have a legitimate right to complain. And it is the duty of the State to see that its legal system does not leave scope for processes which are likely to hinder or defeat justice.

Means must be effective. Since procedure is a means, and justice the end, the means must be effective for realising the end. This requires that the procedure must be simple, fair, effective, speedy and inexpensive.

The procedure must meet the following requirements :

(1) requirement of effectiveness, i.e., an adequate organisation of the Courts for the efficient distribution and despatch of business ;

(2) *requirement of simplicity and speed, i.e.*, freedom from mere technicalities at all stages ;

(3) *requirement of fairness, i.e.*, clear definition of issues ; and wherever possible, the elimination of any element of surprise at the trial ;

(4) *effectiveness of the trial, i.e.*, control and supervision by the Court of the progress of the proceedings and effective methods of execution ; and

(5) *requirement of substantial justice, i.e.*, a speedy and authoritative system of appeal (54th Report of the *Law Commission*, pp. 7-8).

HISTORICAL BACKGROUND

Code of 1859. The history of civil procedure in this country really begins with the year 1859 when the first uniform Code of Civil Procedure, 1859 was

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enacted. Before 1859 the law of Civil Procedure was in a chaotic condition. Not only was there no uniform law of Civil Procedure applicable to the whole of the country, but in the same area different systems of procedure prevailed. The Code of 1859 was soon found to be ill-drawn, ill-arranged and incomplete. As such it was replaced, with certain modifications, by the Code of Civil Procedure, 1877.

Code of 1882. Soon after the enactment of the Code of 1877, it was realised that the Code required several amendments. As many as 130 Sections of the Code were amended in 1879. Further amendments were proposed in 1882. It was then decided that the Code should be completely re-cast. It was in these circumstances that the Code of Civil Procedure, 1882 was enacted.

Code of 1908. Experience of a quarter of a century of the working of the Code of 1882 showed that the general lines on which it proceeded were sound. It was, however, discovered that in respect of some matters the provisions of the Code were too rigid to meet sufficiently the varying needs of the different areas of the country. Moreover, there was some conflict of judicial opinion on the interpretation of certain provisions of the Code. To remedy these and other defects, a comprehensive revision of the Code was undertaken in the year 1907. In the proposed Bill for the revision of the Code, the provisions pertaining to details of procedure and other matters of minor character were relegated to rules contained in a schedule. The object of the re-arrangement was to separate the fundamental and basic provisions which could not be amended except by legislative process, from the comparatively minor and detailed provisions in respect of which it was desirable to provide a more elastic and speedy machinery for modification than the tardy process of legislation. The Bill was enacted as the Code of Civil Procedure, 1908.

The Code of 1908 has stood the test of time. Although it has been amended a number of times since its enactment, it has on the whole worked satisfactorily and smoothly and has evoked the admiration of many distinguished authorities.

The Code was substantially amended in 1976.

Reference to Sections

Reference to Sections in this Chapter, unless otherwise indicated, is to the Sections in the Code of Civil Procedure, 1908 including rules.

Scheme of the Code

The Code consists of two divisions. The first division, containing 158 Sections, is the body of the Code which is fundamental and can be altered only by the Legislature. It lays down the substantive rights of the litigants and creates jurisdiction. The second division consists of the rules in Schedule I which are essentially rules of procedure giving the mode in which the jurisdiction is to be exercised. In Schedule I, there are 51 Orders. Each Other contains several Rules which can be altered. added to, or annulled by High Courts.

Effect of rules in First Schedule. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered (Sec. 121).

Powers of certain High Courts to make rules. High Courts (not being the Court of a Judicial Commissioner) may, from to time after previous publica-

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tion, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence. They may also by such rules annul, alter or add to all or any of the rules in the First Schedule (Sec. 122).

Commencement and extent

The Code came into force on the first day of January, 1909 [Sec. 1 (2)]. It extends to the whole of India except—

(1) the State of Jammu and Kashmir ;

(2) the State of Nagaland and the tribal areas. The State Government of Nagaland has been empowered to extend the provisions of this Code or any of them to the whole or part of the State of Nagaland or to tribal areas, with supplemental, incidental or consequential modifications. The State Government can however do so by a notification in the Official *Gazette* and by specifying the supplemental, incidental or consequential modifications in the Code. 'Tribal areas' means the territories which, immediately before the 21st day of January, 1972, were included in the tribal areas of Assam as referred to in paragraph 20 of the Sixth Schedule to the Constitution [Sec. 1 (3)].

In relation to the Amindivi Islands, and the East Godavari, West Godavari and Visakhapatam Agencies in the State of Andhra Pradesh and the Union Territory of Lakshadweep, the application of this Code shall be without prejudice to the application of any rule or regulation for the time being in force in such Islands, Agencies or such Union territory, as the case may be, relating to the application of this Code [Sec. 1 (4)].

Scope of the Code

The Code not only defines and amends but also consolidates the law of civil procedure. It is however not exhaustive except on points specifically dealt with in it. Where no specific provisions exist in the Code in regard to any matter, the Court should act according to principles of justice, equity and good conscience. Even in matters relating to procedure, it is recognised that all procedure should be accepted to be permissible unless it is prohibited by the Code either expressly or by necessary implication [*Thakkar Lal* v. *Nathulal*, A.I.R. (1964) Raj. 140].

Further the Code does not affect any special or local laws nor does it supersede any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. The Code is the general law so that in case of conflict between the Code and the special law, the latter prevails over the former. Where the special law is silent on a particular point, the Code applies so however that it is not inconsistent with the special enactment.

DEFINITIONS

1. **Code** [Sec. 2 (1)]. It means the Code of Civil Procedure, 1908 and includes rules made thereunder.

2. **Decree** [Sec. 2 (2)]. It means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It may be either preliminary or final. It shall be deemed to include

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the rejection of a plaint and the determination of any question within Sec. 144.[1] It shall not, however, include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

A decree is *preliminary* when further proceedings have to be taken before the suit can be completely disposed of. It is *final* when such adjudication completely disposes of the suit. It may be partly preliminary and partly final. Thus in a suit for possession of land and mesne profits, where the Court orders possession of the land in suit in favour of the plaintiff and directs an inquiry into mesne profits, the first part of the decree is final (as it directs delivery of possession to the plaintiff) while the second part of the decree is preliminary (as it directs an inquiry as to mesne profits).

Where any party aggrieved by a preliminary decree does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree (Sec. 97).

3. **Decree-holder** [Sec. 2 (3)]. 'Decree-holder' means any person in whose favour a decree has been passed or an order capable of execution has been made.

4. **Judgment** (Sec. 2 (9)]. It means the statement given by the Judge o the grounds of a decree or order. Every judgment other than that of a Cou of Small Causes should contain—

(1) a concise statement of the case ;

(2) the points for determination ;

(3) the decision thereon ; and

(4) the reasons for such decision.

Judgment of a Court of Small Causes should contain only points (2) and (3).

5. **Judgment-debtor** [Sec. 2 (10)]. 'Judgement-debtor' means any person against whom a decree has been passed or an order capable of execution has been made.

6. **Legal representative** [Sec. 2 (11)]. 'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued, is the legal representative.

7. **Mesne profits** [Sec. 2(12)]. 'Mesne' (pronounced as 'mean') means 'intermediate in time of occurrence.' 'Mesne profits' of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits. It does not however include profits due to improvements made by the person in wrongful possession.

8. **Movable property** [Sec. 2 (13)]. It includes growing crops.

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1. Sec. 144 enables the successful party to be placed in *status quo ante* and empowers the Courts to order restitution when a decree or an order is varied or reversed in any appeal.

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9. **Order** [Sec. 2 (14)]. It means the formal expression of any decision of a Civil Court which is not a decree.

10. **Public officer'** [Sec. 2 (17)] 'Public officer' means a person falling under any of the following descriptions, namely :—

(1) every Judge ;

(2) every member of an All-India Service ;

(3) every commissioned or gazetted officer in the military, naval or air force of the Union while serving under the Government ;

(4) every officer of a Court of Justice whose duty it is, as such officer, *(a)* to investigate or report on any matter of law or fact, or *(b)* to make, authenticate or keep any document, or *(c)* to take charge of or dispose of any property, *(d)* or to execute any judicial process, or *(e)* to administer any oath, or *(f)* to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;

(5) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(6) every officer of the Government whose duty it is, as such officer, *(a)* to prevent offences, *(b)* to give information of offences, *(c)* to bring offenders to justice, or to protect the public health, safety or convenience ;

(7) every officer whose duty it is, as such officer, *(a)* to take, receive, keep or expend any property on behalf of the Government, or *(b)* to make any survey, assessment or contract on behalf of the Government, or *(c)* to execute any revenue process, or *(d)* to investigate, or to report on, any matter affecting the pecuniary interests of the Government, or *(e)* to make, authenticate or keep any document relating to the pecuniary interests of the Government, or *(f)* to prevent the infraction (violation or breach) of any law for the protection of the pecuniary interests of the Government ; and

(8) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty.

COURTS AND THEIR JURISDICTION

Supreme Court (Articles 124 to 147 of the Constitution). In the hierarchy of Courts, Supreme Court is on the top. It is the highest Court in India. It has both original and appellate jurisdiction. It has original jurisdiction in any dispute—

(a) between the Government of India and one or more States ; or

(b) between the Government of India and any State on one side and another State or States on the other ; or

(c) between two or more States (Article 131 of the Constitution).

Appeal. An appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, whether in a civil, criminal or other proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution (Article 132 of the Constitution). An appeal also lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies—

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(a) that the case involves a substantial question of law of general importance ;

(b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court (Article 133 of the Constitution).

Article 32 of the Constitution guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of Fundamental Rights.

High Courts (Articles 214 to 231 of the Constitution). In the hierarchy of Courts, High Courts come next below the Supreme Court.

Article 214 of the Constitution provides that there shall be a High Court for each State. Article 215 declares that each High Court shall be Court of record and shall have all the powers of such a Court including power to punish for contempt of itself.

Jurisdiction of existing High Courts (Article 225 of the Constitution). The jurisdiction of, and the law administered in any High Court (existing at the time of the commencement of the Constitution) and the respective powers of the Judges of the High Court shall be the same as immediately before the commencement of the Constitution. The powers of the Judges are in relation to the administration of justice in the Court, including any power—

(a) to make rules of Court, and

(b) to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts.

The jurisdiction of the High Courts however is subject to provisions of the Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by the Constitution.

Power of superintendence (Article 227 of the Constitution). Every High Court shall have superintendence over all Courts and Tribunals throughout the territories in relation to which it exercises jurisdiction.

Subordinate Courts (Articles 233 to 237 of the Constitution). Articles 233 to 237 of the Constitution deal with the Subordinate Courts and the appointment, posting and promotion of District Judges.

District Courts. The District Court comes next below the High Court. It is the principal Court of original jurisdiction in a district. In certain cases, it is also a Court of Appeal from the decrees and orders of subordinate and lower Courts in the district.

The next lower Courts in the hierarchy are Provincial Small Cause Courts and Presidency Small Cause Courts (established in the towns of Calcutta and Madras).

Subordination of Courts (Sec. 3)

For the purposes of the Civil Procedure Code, the District Court is subordinate to the High Court. The following Courts are subordinate both to the High Court and the District Court :

(a) Every Civil Court of a grade inferior to that of a District Court, and

(b) Every Court of Small Causes.

Jurisdiction of Courts

Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate and exercise any judicial power in relation

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to it. In other words, by jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision [*Sukhal* v. *Tara Chand*, (1905) 33 Cal. 68].

Jurisdiction may be—

(a) Original jurisdiction. In its original jurisdiction, a Court tries and decides suits filed before it.

(b) Appellate jurisdiction. In its appellate jurisdiction, a Court hears appeals against decrees passed by Subordinate Courts.

(c) Original and appellate jurisdiction. The Supreme Court, the High Courts and District Courts have both original and appellate jurisdiction in regard to certain matters.

The jurisdiction of a Court may also be classified in the following categories :

(1) *Jurisdiction over the subject-matter.* The jurisdiction of certain Courts to try certain matters is limited or precluded by statute. A Small Cause Court, for example, can try only suits for money due under a promissary note or a suit for price of work done, but it has no jurisdiction to try suits for damages for libel and slander, suits for specific performance of a contract or an injunction, or suits for dissolution of partnership.

(2) *Local or territorial jurisdiction.* Every Court has its own local or territorial limits fixed by the Government beyond which it cannot exercise its jurisdiction. A District Judge who is in charge of his district cannot exercise his powers beyond his district.

(3) *Jurisdiction over certain persons.* All persons of whatever nationality are subject to the jurisdiction of the Civil Courts of the country. But no foreign State, the Ruler of a foreign State and other accredited representatives of a foreign State may be sued in any Court otherwise competent to try the suit, except with the consent of the Central Government certified in writing by a Secretary to that Government. Further except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State (Sec. 86).

(4) *Pecuniary jurisdiction.* As regards High Courts and District Courts, there is no limit on their pecuniary jurisdiction. Other Courts, like Small Causes Courts, have only a limited pecuniary jurisdiction.

Sec. 6 deals with *pecuniary jurisdiction* of Courts. It lays down that save in so far as is otherwise expressly provided the Courts shall only have jurisdiction over suits the amount or value of which does not exceed the pecuniary limits, (if any), of its ordinary jurisdiction.

(5) *Jurisdiction as regards character of suits.* Suits may be divided into two categories :

(a) Suits which are of a civil nature. A suit is of a civil nature if the principal question to be decided in a suit relates to a civil or a legal right.

(b) Suits which are not of a civil nature.

It is only suits of a civil nature which a civil Court has jurisdiction to entertain.

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JURISDICTION OF THE COURTS AND RES JUDICATA
(Secs. 9 to 14)

Courts to try all civil suits unless barred (Sec. 9)

The Courts shall have jurisdiction to try all suits of a civil nature. This is subject to—

(a) the provisions contained in the Code, and

(b) exception of suits of which cognizance is either expressly or impliedly barred.

It should be noted that a suit in which the right to property or to an office is contested is a suit of a civil nature. It makes no difference even if such right depends entirely on the decision of questions as to religious rites or ceremonies. It is also immaterial—

(a) whether or not any fees are attached to the office, or

(b) whether or not such office is attached to a particular place.

A suit is of a civil nature if the principal question in the suit relates to the determination of a *civil or legal* right. Suits in which the principal question relates to the right to an office are suits of a civil nature, and they are not the less so because the right claimed may depend on the decision of caste questions or questions as to religious rites or ceremonies or even religious tenets [*Ramachandra Tripathy* v. *Maguni Tripathy*, A.I.R. (1951) Ori. 64].

Stay of suit (Sec. 10)

No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in previously instituted suit between the same parties (or between parties under whom they or any of them claim litigating under the same title). The previously instituted suit may be pending—

(a) in the same or any other Court in India having jurisdiction to grant the relief claimed, or

(b) in any Court beyond the limits of India established or constituted by the Central Government and having like jurisdiction, or

(c) before the Supreme Court.

The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action.

The object of Sec. 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. In other words, Sec. 10 requires that a suit must be stayed if the matter directly and substantially in issue in it is also directly and substantially in issue in a previous suit that is pending [*Nem Kumar Agarwal* v. *Nem Kumar*, (1957) A.L.J. 734].

The principle laid down in Sec. 10 is referred to as the rule of *res sub judice*, *i.e.*, a thing or matter which is under or before a judge or a matter which is under judicial consideration.

Res judicata (Sec. 11)

Sec. 11 deals with the doctrine of *res judicata* which means a thing already adjudicated upon. *Res* means a thing, and *judicata* means already decided

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upon. The doctrine of *res judicata* thus means an issue which has been adjudged. It is based on two fundamental maxims, namely,

(1) No one shall re-agitate for the same cause of action. This maxim is meant to protect the litigant from a vexatious multiplicity of suits.

(2) It is in the interest of the State that there should be an end to litigation. This maxim is based on the ground of public policy.

Sec. 11, which deals with doctrine of *res judicata*, provides thus :

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Conditions for *res judicata*. The following conditions must be satisfied to constitute a bar of *res judicata* :

1. *The matter directly and substantially in issue should be the same.* The matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue either actually or constructively in the former suit. The expression 'former suit' denotes a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

The matter referred to in Sec. 11 must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other. Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Matter actually and constructively in issue. A matter is actually in issue when it is raised by one party and denied by the other party. It is constructively in issue when the matter might or ought to have been made a ground of attack or defence in the former suit. This rule of *constructive res judicata* is based on the following grounds of public policy :

(1) There should be an end to litigation ;

(2) The parties to a suit should not be harrassed to agitate the same issues or matters already decided between them ;

(3) The time of Court should not be wasted over the matters that ought to have been and should have been decided in the former suit between the parties ;

(4) It is a rule of convenience and not a rule of absolute justice.

2. *Former suit between the same parties.* The former suit must have been a suit between the same parties or persons claiming under them.

Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of Sec. 11, be deemed to claim under the persons so litigating. The decision in a case in respect of a public right is binding on all persons interested in that right as, for purposes of Sec. 11, they will be deemed to claim under the persons who litigated in the earlier suit in respect of that public right [*Waqf Khudawand Taala* v. *Seth Mohanlal*, (1956) A.L.J. 225].

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3. *Litigation under the same title.* The parties as aforesaid must have litigated under the same title in the former suit, *i.e.*, they must have litigated in the same capacity. All that the phrase 'litigating under the same title' connotes is that the demand should be of the same quality in the second suit as in the first [*Abdul Gani* v. *Nabendra Kishore Ray*, 57 Cal. 258]. The test of *res judicata* is the identity of title in the two litigations and not the identity of the actual property involved [*Raj Laxami Dassi* v. *Banmali Sen*, A.I.R. (1953) S.C. 33].

4. *Competency of Court to try the subsequent suit.* The Court which decided the former suit must have been a Court competent to try the subsequent suit or the suit in which such issue is subsequently raised. The word 'suit' in this context must be construed literally and it denotes the whole of the suit and not a part of it [*Gulab Bai* v. *Manphool Bai*, A.I.R. (1962) S.C. 214].

For the purposes of Sec. 11, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit. It makes no difference even if the Court of limited jurisdiction is not competent to try the subsequent suit or the suit in which such issue has been subseqently raised.

5. *Heard and finally decided by the Court in the first suit.* The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the Court in the first suit.

Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of Sec. 11, be deemed to have been refused. The legal effect of this is that the omission to grant the relief asked for in the plaint is treated as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata*.

6. *Provisions of Sec. 11 to apply to proceeding for execution of decree.* The provisions of Sec. 11 apply to a proceeding for the execution of a decree. Further references in Sec. 11 to any suit, issue or former suit are construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

It should be noted that doctrine of *res judice* enunciated in Sec. 10 bars the trial of a suit in which the matter directly or substantially is pending adjudication in a previous suit, whereas rule of *res judicata* as laid down in Sec. 11 bars the trial of a suit of an issue in which the matter directly and substantially in issue has already been adjudicated upon in a previous suit between the same parties under the same title. The object of *res judicata* is that there should be an end of litigation on the same matter.

Bar to further suit (Sec. 12)

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

Secs. 13 and 14 deal with foreign judgments.

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PLACE OF SUING
(Secs. 15 to 20)

There are three golden rules relating to the Court where a suit is to be instituted :

(1) Every suit shall be instituted in the Court of the lowest grade competent to try it (Sec. 15). The rule is one of procedure only and not of jurisdiction The object of the Legislature is that the Courts of the higher grades should not be overcrowded [*Nidhilal* v. *Mazhar*, I.L.R. (1885) 7 All. 230]. Thus Sec. 15 in no way ousts the jurisdiction of the Courts of the higher grades which they possess under the Acts constituting them [*Mohini Mohan* v. *Kunj Behari*, (1943) 47 C.W.N. 720].

(2) No Court shall entertain any suit the value of which exceeds the pecuniary limits of its jurisdiction (Sec. 6).

(3) No Court shall entertain any suit which, as regards the subject-matter of the suit, has been precluded from its cognizance.

Courts in which suits may be instituted

Suits to be instituted where subject-matter situate (Sec. 16). Subject to the pecuniary or other limitations prescribed by any law, suits relating to property, whether immovable or movable, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. These suits relating to property may be suits—

(a) for the recovery of immovable property with or without rent or profits,

(b) for the partition of immovable property,

(c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint (seizure of goods by way of distress) or attachment.

But in some cases relief respecting, or compensation for wrong to, immovable property held by on on behalf of the defendant may be entirely obtained through his personal obedience. In such a case, a suit for relief may be instituted either—

(a) in the Court within the local limits of whose jurisdiction the property is situate, or

(b) in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

In Sec. 16 'property' means property situate in India.

Suits for immovable property situate within jurisdiction of different Courts (Sec. 17). Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate. In respect of the value of the subject-

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matter of the suit, the entire claim is cognizable by the Court in which the suit is instituted.

Sec. 17 supplements the provisions of Sec. 16. It applies only to suits falling within Clauses *(a)* to *(e)* of Sec. 16 [*Satya Narayan Banerjee* v. *Radha Nath Das*, A.I.R. (1942) A.C. 69].

Place of institution of suit where local limits of jurisdiction of Courts are uncertain (Sec. 18). Sometimes the local limits of the jurisdiction of two or more Courts within which any immovable property is situate may be alleged to be uncertain. In such a case, any one of these Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property. The decree of the Court disposing of the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction. The suit should however be one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

Where a statement has not been recorded under Sec. 18, an objection may be taken before an Appellate or Revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate. When such an objection is taken, the Appellate or Revisional Court shall not allow the objection unless in its opinion—

(a) there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto, and

(b) there has been a consequent failure of justice.

Suits for compensation for wrongs to person or movable property (Sec. 19). A suit may be for compensation for wrong done to a person or movable property. If the wrong is done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

Examples. (a) A, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

Sec. 19 is limited to torts in India and to defendants residing in India [*Govindan Nair* v. *Achutha Menon*, (1916) 39 Mad. 433].

Other suits to be instituted where defendants reside or cause of action arises (Sec. 20). Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendent, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the

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leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution ; or

(c) the cause of action, wholly or in part arises.

Examples. (a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Varanasi, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B* and *C* at Varanasi, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides ; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

A corporation is deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Sec. 20 is designed to secure that justice might be brought as near as possible to every man's hearth-stone and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he may be involved [*Union of India* v. *Ladulal*, (1963) A.S.C. 1681].

INSTITUTION OF, AND PROCEEDINGS IN, A SUIT

The word 'suit' ordinarily means a civil proceeding instituted by a plaint. The essentials of a suit are as follows :

1. *Opposing parties.* In every suit there must be at least two opposing parties, *i.e.*, a plaintiff and a defendant. There can also be more than one plaintiff and more than one defendant.

2. *Cause of action.* It means "the bundle of essential facts which it is necessary for a plaintiff to prove before he can succeed." [*Dhanjishaw* v. *Forde*, (1887) 11 Bom. 649]. It covers "every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court." [*Cook* v. *Gill*, (1873) 8 C.P. 107]. A plaint shall be rejected if it does not disclose the cause of action [Rule 11 *(a)*, Order 7].

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It does not comprise every fact which it is necessary for the plaintiff to prove to entitle him to a decree in the suit [*Read* v. *Brown*, (1988) 22 Q.B.D. 126]. The cause of action must be antecedent to the institution of the suit [*Dominion of India* v. *Nath & Co.*, A.I.R. (1950) A.C. 207].

3. *Subject-matter of the suit.* It is the right or property claimed in the suit. The value of the subject-matter has to be given in the plaint in order to determine the pecuniary jurisdiction of the Court in which the suit is instituted and also to determine the Court fee.

4. *Relief claimed.* Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative. It shall not be necessary to ask for general or other relief which may always be given as the Court may

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think just to the same extent as if it has been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement (Rule 7, Order 7).

Further the suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The plaintiff may, if he likes, relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court (Rule 2, Order 2).

DIFFERENT STAGES OF A SUIT

1. Institution of suit

Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed (Sec. 26). Presentation must be by delivery of the plaint to the Court or its officer either personally or by a pleader.

The Court shall cause the particulars of every suit to be entered in a book, called the register of civil suits, to be kept for the purpose. The entries in the register shall be numbered every year according to the order in which the plaints are admitted (Rule 2, Order 4).

Particulars to be contained in plaint. The plaint shall contain the following particulars :—

(a) the name of the Court in which the suit is brought ;

(b) the name, description and place of residence of the plaintiff ;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;

(e) the facts constituting the cause of action and when it arose ;

(f) the facts showing that the Court has jurisdiction ;

(g) the relief which the plaintiff claims ;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and

(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court fees, so far as the case admits (Rule 1, Order 7)

2. Issue and service of summons

Summons to defendants. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed (Sec. 27).

Order 5 deals with issue and service of summons.

The Rules as contained in Order 5 are as follows :

(1) *Issue of summons.* When a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified. But no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

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Where the summons is issued it shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court. It shall also be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

(2) *Appearance by the defendant.* A defendant to whom a summons has been issued may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) *Personal appearance of defendant and plaintiff.* Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in the Court on the day therein specified. Likewise where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

(4) *Service of summons.* Where the defendant resides within the jurisdiction of the Court in which the suit is instituted (or has an agent resident within that jurisdiction who is empowered to accept the service of the summons), the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or by one of his subordinates. The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

(5) *Mode of service.* Service of summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

Service of summons where defendant resides in another State (Sec. 28). A summons may be sent for service in another State to such Court and in such manner as may be prescribed by rules in force in that State.

The Court to which such summons is sent shall, upon receipt thereof, proceed as if it has been issued by such Court. It shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

Sec. 29 deals with service of foreign summonses.

Summons to witness (Sec. 31). The provisions in Sec. 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

3. Written statement

The defendent shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence Where the defendant relies on any document (whether or not in his possession or power) in support of his defence or claim for set-off or counter-claim, he shall enter such documents in a list (Rule 1, Order 8).

The written statement should deal with each allegation in the plaint. It should also state with respect to each allegation whether it is admitted or denied. This written statement is the defendant's answer to the plaintiff's claim.

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4. Discovery and inspection

Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party—

(a) make such orders as may be necessary or reasonable in all matters relating to the *(i)* delivery, and answering of interrogatories, *(ii)* the admission of documents and facts, and *(iii)* the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;

(c) order any fact to be proved by affidavit (Sec. 30).

Order 11 contains rules relating to discovery and inspection.

5. Appearance of parties

Parties to appear on day fixed in summons for defendant to appear and answer. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders. The suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court (Rule 1, Order 9).

Where neither party appears, suit to be dismissed. Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed (Rule 3, Order 9).

Procedure when only plaintiff appears. Where the plaintiff appears and the defendant does not appear when the suit is called for hearing, the following rules apply :

(a) When summons is duly served. If it is proved that the summons was duly served the Court may make an order that the suit shall be heard *ex parte.*

(b) When summons is not duly served. If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant.

(c) When summons is served but not in due time. If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant (Rule 6, Order 9).

Procedure where defendant only appears. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. If the defendant admits the claim, or part thereof, the Court shall pass a decree against the defendant upon such admission. Where only part of the claim is admitted by the defendant, the Court shall dismiss the suit so far as it relates to the remainder (Rule 8, Order 9).

Parties not at issue. Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment (Rule 1, Order 15).

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6. Hearing of the suit

Right to begin. If the parties are at issue, a date is fixed for hearing. The plaintiff has the right to begin. If the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant that plaintiff is not entitled to any part of the relief which he seeks, the defendant has the right to begin (Rule 1, Order 18). Then the other party states his case, produces evidence and addresses the Court on the whole issue.

7. Judgment and decree

The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Order 20 contains the following rules relating to judgement and decree :

(1) Judgment when pronounced. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or, as soon thereafter as may be practicable, on some future day. When the judgment is to be pronounced on some future day, the Court shall fix a day for that purpose, of which due notice shall be given to the parties or their pleaders.

Where the judgment is not pronounced at once, every endeavour shall be made by the Court to pronounce the judgment within 15 days from the date on which the hearing of the case was concluded. Where it is not practicable so to do, the Court shall fix a future day for the pronouncement of the judgment, and such day shall not ordinarily be a day beyond 30 days from the date on which the hearing of the case was concluded and due notice of the day so fixed shall be given to the parties or their pleaders.

Where a judgment is not pronounced within 30 days from the date on which the hearing of the case was concluded, the Court shall record the reasons for such delay and shall fix a future day on which the judgment will be pronounced and due notice of the day so fixed shall be given to the parties or their pleaders.

(2) Contents of decree. The decree shall agree with the judgment. It shall contain the following information :

(a) the number of the suit,

(b) the names and descriptions of the parties and their registered addresses,

(c) particulars of the claim,

(d) the relief granted or other determination of the suit,

(e) the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

8. Execution

This is the last stage of the suit. It is the enforcement by a process of the Court of its own decrees or orders. In other words, it is a process of law to make a decree or order of a Court effective.

The provisions of the Code relating to the execution of a decree (including provisions relating to payment under the decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order) (Sec. 36).

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Court by which decree may be executed (Sec. 38). A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

Enforcement of decree against legal representative (Sec. 52). Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

Order 21 contains rules regarding execution of decrees and orders.

SET-OFF, COUNTER CLAIM AND EQUITABLE SET-OFF

Set-off (Rule 6, Order 8)

Set-off is a reciprocal acquittal of debts between the plaintiff and the defendant. In an action for recovery of money by the plaintiff, a set-off is a cross-claim for money by the defendant, for which he has a right of action against the plaintiff. Set-off has the effect of extinguishing the plaintiff's claim to the extent of the amount claimed by the defendant as a cross-claim.

Rule 6 of Order 8, which deals with 'set-off', provides in this regard thus :

Particulars of set-off to be given in written statement. In a suit for the recovery of money the defendant may claim to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff. The sum of money so claimed should not however exceed the pecuniary limits of the jurisdiction of the Court. If both the parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

Effect of set-off. The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off ; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

The set-off referred to in Rule 6 is a legal set-off.

Examples. (a) A bequeaths Rs. 2,000 to *B* and appoints *C* his executor and residuary legatee. *B* dies and *D* takes out administration to *B's* effects. *C* pays Rs. 1000 as surety for *D* ; then *D* sues *C* for the legacy. *C* cannot set-off the debt of Rs. 1,000 against the legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to *B*. *C* takes out administration to *A's* effects and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against B, the latter cannot set-off the debt against the price, for *C* fills two different characters, one as the vendor to *B*, in which he sues *B*, and the other as representative to *A*.

(c) A sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B's* goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

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(d) A sues *B* on a bill of exchange for Rs. 500, *B* holds a judgment against *A* for Rs. 1,000. The two claims being both definite, pecuniary demands may be set-off.

(e) A sues *B* for compensation on account of trespass. *B* holds a promissory note for Rs. 1,000 from *A* and claims to set-off that amount against any sum that *A* may recover in the suit. *B* may do so, for as soon as *A* recovers, both sums are definite pecuniary demands.

(f) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set-off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set-off a debt due to him alone by *A*.

(h) *A* owes the partnership firm of *B* and *C* Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,500 due in his separate character. *C* may set-off the debt of Rs. 1,000.

Counter-claim by defendant (Rule 6-A, Order 8)

A defendant in a suit may set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit. The defendant may set-up this counter-claim before he has delivered his defence or before the time limited for delivering his defence has expired. It is immaterial whether such counter-claim is in the nature of a claim for damages or not. The amount of such counter-claim should not however exceed the pecuniary limits of the jurisdiction of the Court. The counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim. This right of the defendant to set up a counter-claim is in addition to his right of pleading a set-off under Rule 6. The counter-claim of the defendant shall be treated as a plaint and governed by the rules applicable to plaints.

The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

Counter-claim to be stated (Rule 6-B, Order 8). Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

Equitable set-off

When a defendant is allowed set-off in respect of a claim for an unascertained sum of money, the set-off is called equitable set-off. But in order that a claim for equitable set-off may arise, it is not sufficient that there are cross-demands ; it is further necessary that there should be a connection between the plaintiff's claim for a debt and the defendant's claim to set-off which makes it inevitable to drive the defendant to a separate suit, as for instance when they arise out of the same transaction or transactions which can be regarded as one transaction or where there is on each side knowledge of and confidence in one debt discharging the other [*Hari Anand* v. *Mohd. Esahak*, 40 C.W.N. 751]. These are principally cases where the cross-demands arise out of the same transaction, or are so connected in their nature and circumstances that they can be looked upon as part of one transaction.

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The Common Law Courts in England refused to take notice of equitable claims for they were not ascertained sums. The Courts of Equity, however, recognised such claims. In India the distinction between legal and equitable set-off remains. The provisions as to legal set-off are contained in Rule 6, Order 8. Rule 6-A of Order 8 has been inserted to recognise the counter-claim by the defendant. The provisions of Rules 6 and 6-A of Order 8 are not exhaustive. An equitable set-off can be claimed independently of the Code.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS

An injucntion is a judicial process by which one who has transgressed or is threatening to transgress or invade the rights, legal or equitable of another, is restrained from continuing or commencing such wrongful act. This is a preventive relief granted at the discretion of the Court.

An injunction may be a temporary injunction or a perpetual injunction (Sec. 36 of the Specific Relief Act, 1963).

A *temporary injunction* is such as is to continue until a specified time, or until the further order of the Court. It may be granted at any stage of the suit. It is regulated by the Code Civil Procedure, 1908.

A *perpetual injunction* can only be granted by a decree made at the hearing and upon the merits of the case. In case of a perpetual injunction the defendant is perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff (Sec. 37 of the Specific Relief Act, 1963).

Temporary injunction

Rules 1 to 5 of Order 39 of the Code deal with temporary injunctions.

(1) *Cases in which temporary injunction may be granted.* The Court may, by order, grant a temporary injunction to the plaintiff where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding his creditors.

(c) that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit.

The temporary injunction may be granted to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as the Court thinks fit. The temporary injunction is granted until the disposal of the suit or until further orders.

The power of the Court to grant a temporary injunction, though discretionary, must be judicially exercised. Before granting a temporary injunction, the Court must be satisfied that—

(a) the plaintiff has a *prima facie* case ;

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(b) the Courts's interference is necessary to protect him from irreparable or at least serious injury ;

(c) the balance of convenience is in favour of the person who asks for the injunction ;

(d) there is no other sufficient or adequate remedy open to him by which to protect himself ; and

(e) the plaintiff canot be compensated by damanges [*Mooraj Mal* v. *Administrator, Municipal Committee*, (1953) A.M.L.J. 91].

The other rules relating to temporary injunction are briefly summed up as under :

(2) *Injunction to restrain repetition or continuance of breach.* In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may apply to the Court for a temporary injunction. The injunction sought for is to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The application may be made at any time after the commencement of the suit, and either before or after judgment. The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

(3) *Before granting injunction, Court to direct notice to opposite party.* The Court shall, before granting an injunction, direct notice of the application for the same to be given to the opposite party. The Court may dispense with the notice where it appears that the object of granting the injunction would be defeated by the delay.

(4) *Court to dispose of application for injunction within 30 days.* Where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within 30 days from the date on which the injunction was granted. Where the Court is unable so to do, it shall record its reasons for such inability.

(5) *Order for injunction may be discharged, varied or set aside.* Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Injunction to corporation binding on its officers. An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Interlocutory orders

'Interlocutory' means something intervening or happening between the commencement of legal proceedings and their termination. 'Interlocutory order' denotes merely order of a purely interim or temporary nature which does not decide or touch the important rights or liabilities of the parties [*Amar Nath* v. *State of Haryana*, A.I.R. (1977) S.C. 2185]. It relates to matters of procedure as they arise during the suit or in the course of execution proceedings.

Rules 6 to 10 of Order 39 deal with interlocutory orders.

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(1) *Power to order interim sale.* The Court may, on the application of any party to a suit, order the sale of any movable property, being the subject-matter of such suit or attached before judgment in such suit. The Court will order the sale of the movable property if it is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once. The sale will be made by a person named in the order of the Court and in such manner and on such terms as the Court thinks fit.

Detention, preservation, inspection, etc., of subject-matter of suit. The Court may, on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

(3) *Application for such orders to be after notice.* An application by the plaintiff for an order under Rule (1) or (2) referred to above may be made at any time after institution of the suit.

Before making an order on the application made for the purpose, the Court shall direct notice thereof to be given to the opposite party. The Court may dispense with the notice except where it appears that the object of making such order would be defeated by the delay.

(4) *When party may be put in immediate possession of land—the subject-matter of suit.* A land paying revenue to the Government, or a tenure liable to sale, may be the subject-matter of a suit. If the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, such land or tenure may be consequently ordered to be sold. In such a case, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure. The Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit

(5) *Deposit of money, etc., in Court.* Where the subject-matter of a suit is money or some other thing capable of delivery and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be

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deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

SUITS BY OR AGAINST CORPORATIONS

Order 29 of the Code deals with the provisions relating to suits by or against corporations. The Rules as contained in Order 29 are as follows :

Rule 1. Subscription and verification of pleading. In suits by or against a corporation, any pleadng may be signed and verified on behalf of the corporation by *(a)* the secretary, or *(b)* any director, or *(c)* other principal officer of the corporation, who is able to depose to the facts of the case.

Rule 2. Service on coporation. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office. If the corporation has no registered office the summons may be served at the place where the corporation carries on business.

Rule 3. Power to require personal attendance of officer of corporation. The Court may, at any stage of the suit, require the personal appearance of the secretary or any director, or other prinicipal officer of the corporation who may be able to answer material questions relating to the suit.

SUITS BY OR AGAINST MINORS

A minor is a person who has not completed 18 years of age (Sec. 3 of the Indian Majority Act, 1875). In the following two cases, he attains majority after 21 years of age :

(1) Where a guardian of a minor's person or property has been appointed under the Guardians and Wards Act, 1890, or

(2) Where the superintendence of a minor's property is assumed by a Court of Wards.

Order 32 of the Code deals with the provisions relating to suits by or against minors and persons of unsound mind. The provisions are the same for both minors and persons of unsound mind, except a few differences.

The basic rule as regards suits by or against minors is that the law protects minors against their immaturity and inexperience and also against the possible improper designs of those more experienced in years.

The important Rules of Order 32 are as follows :

(1) *Minor to sue by next friend.* Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

(2) *Who may act as next friend or be appointed guardian for the suit ?* Any person may acts as next friend of a minor or as his guardian for the suit if—

(a) he is of sound mind ;

(b) has attained the age of majority ;

(c) his interest is not adverse to that of the minor ; and

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(d) he is not in the case of next friend, a defendant, or in the case of a guardian for the suit, a plaintiff.

Where a minor has a guardian appointed or delared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. Further, no person shall without minor's consent in writing be appointed guardian for the suit.

(3) *Suit instituted without next friend.* Where a suit is instituted by or on behalf of a minor without next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(4) *Guardian for the minor defendant.* Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. An application for the order for the appointment of a guardian may be made in the name and on behalf of the minor or by the plaintiff. The application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

Position on attaining majority (Rules 12 to 14, Order 32)

(1) *Election on attaining majority.* A minor plaintiff or a minor not a party to suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application. Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name. The title of the suit or application shall in such case be corrected. Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(2) *Minor co-plaintiff attaining majority.* Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff. If the Court finds that the minor co-plaintiff is not a necessary party, it shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(3) *Unreasonable or improper suit.* A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

SUMMARY PROCEDURE

Order 37 provides for a summary procedure in respect of certain suits. The essence of the summary suit is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence.

Courts and classes of suits to which Order 37 is to apply (Rule 1, Order 37)

The rules regarding summary procedure as contained in Order 37 shall apply to the following Courts, namely :

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(a) High Courts, City Civil Courts and Courts of Small Causes ; and

(b) other Courts. In respect of these Courts, the High Court may, by notification in the Official *Gazette*, restrict the operation of Order 37 only to such categories of suits as it deems proper. It may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official *Gazette*, further restrict, enlarge or vary, the categories of suits to be brought under the operation of Order 37 as it deems proper.

The procedure by way of summary suits applies to the following classes of suits, namely :

(a) suits upon bills of exchange, *hundis* and promissory notes ;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest.

The debt or liquidated demand in money payable by the defendant should arise *(i)* on a written contract, *or (ii)* on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty or *(iii)* on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.

Institution of summary suits (Rule 2, Order 37)

A suit, to which Order 37 applies, may, if the plaintiff desires to proceed thereunder, be instituted by presenting a plaint. The plaint shall contain—

(a) a specific averment to the effect that the suit is filed under this Order ;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint ; and

(c) the inscription, immediately below the number of the suit in the title of the suit that the suit is being filed under Order 37.

The summons of the suit shall be in the prescribed form.

The defendant shall not defend the suit referred to above unless he enters an appearance. In default of defendant's entering an appearance, the allegations in the plaint shall be deemed to be admitted. And that being so, the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate speficied, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.

Procedure for the appearance of defendant (Rule 3, Order 37)

In a suit to which Order 37 applies, the plaintiff shall, together with the summons, serve on the defendant a copy of the plaint and annexures thereto. The defendant may, at any time within 10 days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

The defendant may, at any time within 10 days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such facts as may be deemed sufficient to entitle him to defend, or apply on such summons for

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leave to defend such suit. Leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. This leave shall however be not granted where—

(a) the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious ; and

(b) the part of the amount claimed by the plaintiff and admitted by the defendant to be due from him is deposited by the defendant in Court.

The Court or judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.

At the hearing of such summons for judgment, the plaintiff shall be entitled to judgment forthwith—

(a) if the defendant has not applied for leave to defend ;

(b) if the defendant has made the application to defend but it is refused ;

(c) if the defendant is permitted to defend as to the whole or any part of the claim, but he fails to give the required security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge.

Power to set aside decree (Rule 4, Order 37)

After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

A summary suit must be brought within 1 year from the date on which the debt becomes due and payable, whereas the period of limitation for suit brought in the ordinary manner on a negotiable instrument is 3 years.

APPEALS

A right of appeal is not an inherent right of a person. It must be given by a statute or by some authority equivalent to a statute [*Minakshi* v. *Subramanya*, (1888) 11 Mad. 26]. Unless a right of appeal is clearly given by a statute, it does not exist, whereas a litigant has independently of any statute a right to institute any suit of a civil nature in some Court or another [*Zair Hussain Khan* v. *Khurshed Jan*, (1906) 28 All. 545]. If the Legislature in its wisdom thinks in a particular case that no appeal should lie, it cannot be held that legislation is bad [*Ishar Singh* v. *State of Haryana*, A.I.R (1975) P. &. H. 29].

Part VII of the Code (Secs. 96 to 112) deals with the following four kinds of appeals :

1. Appeals from original decrees (Secs. 96 to 99-A, Order 41).
2. Appeals from appellate decrees or second appeals (Secs. 100 to 103, Order 42).
3. Appeals from orders (Secs. 104 to 106, Order 43).
4. Appeals to the Supreme Court (Secs. 109 and 112, Order 45).

Secs. 107 and 108 deal with general provisions relating to appeals.

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1. *Appeals from original decrees.* An appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court. This is, however, subject to the provisions expressly provided in the Code or by any other law for the time being in force (Sec. 96). Thus according to Sec. 96, an appeal from an original decree may be preferred in the Court superior to the Court passing the decree and the first appeal from the original decree can be based on points of *law* as well as on *facts*.

2. *Second appeal.* An appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a *substantial question of law*. This is subject to the provisions expressly provided in the body of this Code or by any other law for the time being in force (Sec. 100).

Thus according to Sec. 100, a second appeal may lie only on the ground:

(1) that the decision is contrary to the law or any usage which has the force of law, or

(2) that the decision failed to determine some material issue of law or usage having the force of law, or

(3) that a substantial error or defect in the procedure as provided by the Code may possibly have produced an error or defect in the decision of the case on merits.

In *Durga Chowdhrani* v. *Jawahir Singh*, (1891) 18 Cal. 23 P.C., the Privy Council observed that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross the error may seem to be....Where there is no error or defect in procedure, the finding of the first appellate Court upon a question of fact is final, if that Court has before it evidence proper for its consideration is support of the finding.

Sec. 101 further provides that no second appeal shall lie except on the grounds mentioned in Sec. 100.

3. *Appeal from orders.* An appeal shall lie from the following orders and from no other orders (except as expressly provided in the body of this Code or by any other law for the time being in force), namely—

(1) An order under Sec. 35-A (which deals with compensatory costs in respect of false or vexatious claims or defences).

No appeal shall however lie against the order save on the ground that no order or an order for the payment of a less amount, ought to have been made.

(2) An order under Sec. 91 (which deals with public nuisances and other wrongful acts affecting the public) or Sec. 92 (which deals with public charities) refusing leave to institute a suit of the nature referred to in Sec. 91 or Sec. 92, as the case may be.

(3) An order under Sec. 95 (which deals with compensation for obtaining arrest, attachment or injunction on insufficient ground).

(4) An order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

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(5) Any order made under rules from which an appeal is expressly allowed by rules (Sec. 104). No appeal shall however lie from any order passed in appeal under Sec. 104.

4. *Appeal to the Supreme Court.* An appeal shall lie to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court, if the High Court certifies—

(1) that the case involves a substantial question of law of general importance ; and

(2) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

This right of appeal is subject to the provisions in Chapter IV of Part V of the Constitution and such rules as may, from time to time, be made by the Supreme Court regarding appeals from the Courts of India (Sec. 109). Part V of the Constitution deals with Union of India and Chapter IV of Part V deals with the Union Judiciary *(i.e.* Supreme Court).

Appeal by an indigent person. A person entitled to prefer an appeal may be unable to pay the fee required for the memorandum of appeal. He may be allowed to appeal as an indigent person, subject, in all matters, including the presentation of application, to the provisions relating to suits by indigent persons in so far as those provisions are applicable (Rule 1, Order 44).

Production of additional evidence in Appellate Court

The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But the Court may allow such evidence or document to be produced, or witness to be examined, if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the party seeking to produce additional evidence, establishes that in spite of exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(c) the Appellate Court requires any document to be produced, or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission (Rule 27, Order 41).

Contents, date and signature of judgment

The judgment of the Appellate Court shall be in writing and shall state—

(1) the points for determination ;

(2) the decision thereon ;

(3) the reasons for the decision ; and

(4) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

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The judgment shall at the time it is pronounced be signed and dated by the Judge or by the Judges concurring therein (Rule 31, Order 41).

REFERENCE, REVIEW AND REVISION

Reference to High Court (Sec. 113)

Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

Rule 1 of Order 46 provides in this regard as follows : Before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or in the execution of any such decree, a question of law or usage having the force of law may arise. In such a case, if the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt it may draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court. The Court may refer the case to the High Court either of its own motion or on the application of any of the parties.

Review (Sec. 114)

Any person considering himself aggrieved by the judgment of a Court may apply for a review of the judgment to the Court which passed the decree or made the order. The Court may make such order thereon as it thinks fit—

(a) by decree or order from which an appeal is allowed by the Code, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed by the Court, or

(c) by a decision on a reference from a Court of Small Causes,

The grounds for application for the review of a judgment are mentioned in Rule 1 of Order 47. These grounds are as follows :

(a) discovery by the applicant of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or

(b) some mistake or error apparent on the face of the record, or

(c) any any other sufficient reason.

Revision (Sec. 115)

The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. It may make such order in the case as it thinks fit if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court shall not, under Sec. 115, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where—

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(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

Further, the High Court shall not, under Sec. 115, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

In Sec. 115, the expression 'any case which has been decided' includes any order made, or any order deciding an issue in the course of a suit or other proceeding.

TEST QUESTIONS

1. Discuss the following terms as used in the Code of Civil Procedure, 1908 : Order, judgment, decree, legal representative, mesne profits, public officer.
2. Discuss the jurisdiction and structure of Civil Courts.
3. Write a note on hierarchy of Courts.
4. What do you understand by a suit of civil nature ?
5. *(a)* Define decree and order and point out the differences between them. *(C.S.E. December 1987)*
   (b) Distinguish between decree and order. *(C.S.E. December 1989)*
   (c) Explain the rule of *res judicata*. *(C.S.E. June 1990)*
   (d) Distinguish between appeal and revision. *(C.S.E. December 1990)*
6. Distinguish between preliminary and final decrees.
7. What is doctrine of *res judicata* ? Distinguish it from rule of *res sub judice* ? Enumerate the conditions on satisfaction of which the *doctrine of res judicata* may be invoked. *(C.S.E. June 1992)*
8. What are the rules regarding institution of a suit ?
9. What are the essentials of a suit ?
10. What are different stages of a suit beginning from institution of the suit to the execution of the decree ?
11. When is a written statement to be filed ? What are its contents ? Can a defendant set up a counter-claim ?
12. Define an order. What are appealable orders ?
13. Discuss the summary proceedings in a civil suit.
14. Discuss the law relating to suits by or against minors. *'C.S.E. June 1993)*
15. Write short notes on :
   (a) Set-off, counter-claim and equitable set-off.
   (b) Temporary injunctions and interlocutory orders.
   (c) Suits by or against corporations.
   (d) Suits by or against minors.
   (e) Summary procedure.
   (f) *Res judicata*. *(C.S.E. December 1989)*
   (g) Declaratory decree. *(C.S.E. June 1990)*
16. Discuss briefly the provisions relating to reference, review and revision. *(C.S.E. June 1988)*

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17. Explain set-off, counter-claim and equitable set-off under the Civil Procedure Code, 1908. *(C.S.E., June 1989)*

18. What do you understand by 'reference', 'review' and 'revision'? *(C.S.E., June 1991)*

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. A judgment-debtor dies before judgment and the property is taken by a stranger. Can the decree be enforced against him ? *(C.S.E. December 1986)*

[Hint : Yes. Sec. 52].

2. Raja files a summary suit for recovery of Rs. 25,000 against Kumar & Sons. The summons is served on 15th December, 1993. They instruct you as an advocate to appear on their behalf on 26th December, 1993. How will you proceed ? *(C.S.E. December 1987, modified)*

[Hint : Refer to Order 37].

3. The plaintiff *A* sues *B* on a contract and obtains a decree. *B* afterwards sues *A* for recission of the contract on the ground that it did not fuly represent the agreement between the parties. Decide whether the doctrine of *res judicata* would apply to the second suit by *B* against *A* ? *(C.S.E. December 1987)*

[Hint : No. Sec. 11].

4. Hari enters into an agreement with Bansi to sell his house situated at Bombay. Both the parties reside at Delhi and agreement is entered at Delhi. Bansi sues Hari for specific performance of contract at Delhi. Hari claims Delhi Courts have no jurisdiction to entertain such suit. Will he succeed ? *(C.S.E. June 1989)*

[Hint : Yes. Sec. 16].

5. AB & Sons, an unregistered partnership firm, brought a suit to recover the price of goods. The plaint was rejected as the suit was barred under Sec. 69 of the Partnership Act, 1932. Thereafter, the firm got registered and fresh suit was brought on the same cause of action. Is the subsequent suit barred by the doctrine of *res judicata* ? *(C.S.E. June 1987 June 1989, December 1988)*

[Hint : No. Sec. 11].

6. *A* files a suit against B to recover money on a promissory note. *B* contends that the promissory note was obtained from him by undue influence. The suit is decreed in spite of this objection. *B* subsequently wants to challenge the promissory note by a fresh suit on the ground of fraud and coercion. Is the second suit barred by *res judicata* ? Give reasons. *(C.S.E. June 1988)*

[Hint : Yes. Sec. 11].

7. *A.* Ltd. filed a summary suit against *B* Ltd. The summons was served on the defendants on 10th February, 1993, when the company secretary of the defendant company was on medical leave. He appeared on behalf of the defendants on 17th March, 1993, two days after he resumed his duty. State the consequences. *(C.S.E. December 1990, modified).*

[Hint : The company has committed a default as it does not enter on appearance within 10 days of the service of the summons. The Court may excuse the delay on sufficient cause being shown (Rule 3, Order 37)].

8. A suit is dismissed on technical ground of misjoinder of parties. Thereafter the defect is remedied and the suit is filed again. Will it be affected by the principle of *res judicata* ? *(C.S.E. June 1991)*

[Hint : No. Sec. 11 is not applicable in this case].

9. A and Co. files a suit under Order XXXVII of the Code of Civil Procedure 1908 for recovery of Rs. 50,000 which were given by it as loan to its employee *B* against a promissory note executed by B in the Court of the District Judge. *B* received the

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summons for judgment in the suit under Order XXXXVI! of the Code of Civil Procedure, 1908. *B* files written statement only after 20 days of the receipt of the summons in the said suit. The Court of District Judge ignores the writen statement of *B* and outright passes judgment and decrees for recovery of Rs. 50,000 with costs against *B*.

How would you support the judgment of the Court of District Judge, decreeing the suit for Rs. 50,000 with costs against *B* ? *(C.S.E. June 1992)*

[Hint : The judgment is valid as *B* has not enterd his appearance within 10 days from the date of service of the summons].

10. *A* files a suit against *B* for enhancement of rent. The Court dismisses the suit holding that the rent is already too high. *B* now files a suit against *A* for reduction of rent and pleads that the previous decision that the rent in excersive will operate as *res judicata*. Is the plea valid ? *(C.S.E. December 1992)*

[Hint : No].

11. *X*, *Y* and *Z* own a house at Delhi, a shop at Bombay, and a farm at Sri Ganganagar in Rajasthan. They made a partition of this property by an agreement at Jaipur. *X*, being aggreeved by this partition, files a suit for challenging this position in a Court at Delhi. *Y* and *Z* raised an objection that the suit should have been filed at Jaipur. How will the Court decide this issue ? *(C.S.E. June 1993)*

[Hint : The objection will be dismissed. Sec. 16].

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6

The Code of Criminal Procedure, 1973

The law relating to criminal procedure is contained in the Code of Criminal Procedure, 1973 which replaced the 75-year old Code of Criminal Procedure, 1898. It came into force on April 1, 1974 [Sec. 1 (3)].

Object of the Code

The object of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Code) is to provide machinery for the punishment of offences against the substantive criminal law (as contained in the Indian Penal Code, 1860) and to ensure to the accused a fair trial for the ascertainment of his guilt or innocence. The Code prescribes the procedure for the trial of offences which the Indian Penal Code, 1860 defines [*In re Surendra Nath Banerji* v. *Chief Justice of Bengal*, 10 Cal. 109 (P.C.)].

Like all procedural laws, the Code is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The Indian Penal Code, 1860 defines the offences and provides for their punishment ; the Code of Criminal Procedure, 1973, on the other hand, creates different grades of Courts, prescribes powers of such Courts to take cognizance of offences and deals with the several proceedings of the Courts at the various stages of the inquiry or trial.

The main object of the Code of Criminal Procedure, 1973 is thus to supplement the Indian Penal Code, 1860 by rules of procedure with a view to preventing offences and bringing offenders to justice.

Extent of Code

The Code extends to the whole of India except the State of Jammu and Kashmir. The provisions of the Code, other than those relating to chapters VIII, X and XI[1] thereof, shall not apply to—

(a) the State of Nagaland,

(b) the tribal areas.

The concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the State of Nagaland or such tribal areas, as the case may be, with such supplemental, incidental or consequential modifications as may be specified in the notification [Sec. 1 (2)].

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1. *Chapter VIII* deals with security for keeping the peace and for good behaviour. *Chapter X* deals with maintenance of public order and tranquility. *Chapter XI* deals with preventive action of the police.

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In Sec. 1 (2), 'tribal areas' means the territories which immediately before the 21st day of January, 1972, were included in the tribal areas of Assam, as referred to in paragraph 20 of the Sixth Schedule to the Constitution, other than those within the local limits of the municipality of Shillong [Explanation to Sec. 1 (2)].

Reference to Sections

Unless otherwise indicated, reference to Sections in this Chapter is to the Code of Criminal Procedure, 1973 (referred to as the Code in this Chapter).

DEFINITIONS

1. **Offence** [Sec. 2 *(n)*]. It means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Sec. 20 of the Cattle Trespass Act, 1871.

There is a presumption that *mens rea*, an evil intention or a knowledge of the wrongfulness of act, is an essential ingredient in every offence [*State of Maharashtra* v. *Mayer Hans George*, A.I.R. (1956) S.C. 722]. *Actus non facit ream nisi mens sit rea*, which means an act does not constitute guilt unless it is done with a guilty intent, is the fundamental principle of penal liability.

It is of the utmost importance for the protection of the liberty of man that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of the crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind [*Brend* v. *Wood*, (1946) 62 T.L.R. 482 (D.C.)].

2. **Bailable and non-bailable offences** [Sec. 2 *(a)*]. 'Bailable offence' means an offence which is shown as bailable in the First Schedule of the Code, or which is made bailable by any other law for the time being in force. 'Non-bailable offence' means any other offence.

'Bail' means the release of an accused from the custody of the officers of law and entrusting him to the private custody of persons who become bound as sureties to produce the accused to answer the charge at the stipulated time or date.

Bailable offences are less serious than non-bailable offences. In bailable offences bail is granted as a matter of course. The bail may be granted either by the police officer in charge of the accused person or by the Court. In case of non-bailable offences bail is not granted as a matter of course, but it does not mean that an accused person cannot be granted bail under any circumstances. Sec. 437 gives the Court or a police officer unfettered discretion to grant bail in case of non-bailable offences, *except* where there appear reasonable grounds for believing that the accused person is guilty of an offence punishable with death or imprisonment for life. But a person under the age of 16 years or any women or any sick or infirm person may be released on bail even if the offence be punishable with imprisonment for life or with death.

Anticipatory bail (Sec. 438). It is a bail which is granted to a person who apprehends arrest but has not yet been arrested When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under Sec. 438. The Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail subject to the following conditions, namely, that the person shall—

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(1) make himself available for interrogation by a police officer as and when required ;

(2) not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer ;

(3) not leave India without the previous permission of the Court.

3. **Cognizable and non-cognizable offences** [Sec. 2 *(c)* and *(l)*]

Cognizable offence [Sec. 2 *(c)*]. It means an offence for which a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. Likewise a 'cognizable case' means a case in which a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant.

Cognizable offences are generally more serious in nature and are heavily punishable. In such cases the police have hardly any time or opportunity to obtain a warrant of arrest from the Court as the offender may escape by the time a warrant is obtained or he may tamper with material evidence. It is the duty of the police to apprehend as quickly as possible offenders in cognizable cases, to initiate proceedings and to prevent the commission of such offences. The examples of cognizable offences are murder, culpable homicide, dacoity, abetting mutiny, counterfeiting coins.

Non-cognizable offence [Sec. 2 *(l)*]. It means as offence for which a police officer has no authority to arrest without warrant. Likewise 'non-cognizable case' means a case in which a police officer has no authority to arrest without warrant.

Non-cognizable offences are less serious in nature compared to cognizable offences. In case of these offences injury caused to the society is comparatively small. The criminal poceedings in case of such offences are commenced after a complaint has been lodged by the injured or aggrieved party. The examples of non-cognizable offences are : causing a simple hurt, undue influence at an election, false claim in a Court of Law.

The First Schedule attached to the Code contains a list of offences. Column 4 shows whether the offence is cognizable or non-congnizable. In case of a cognizable offence, a police officer may arrest without a warrant. In case of a non-cognizable offence, a police office shall not arrest without a warrant.

4. **Complaint** [Sec. 2 *(d)*]. It means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence. It does not include a police report.

The essentials of a complaint are as follows :

(1) The complaint means an allegation made to a Magistrate (and not a police officer).

(2) The allegation may be made orally or in writing to the Magistrate.

(3) The allegation must be made with a view to the Magistrate's taking action under the Code.

(4) The allegation must be that some person has committed an offence.

(5) The person who has committed the offence may or may not be known to the complainant.

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(6) The complaint need not be necessarily made by the aggrieved person. It may be made by any person who is aware of the offence.

(7) The complaint does not include a police report. 'Police report' according to Sec. 2 *(r)* means a report forwarded by a police officer to a Magistrate.

5. **Inquiry** [Sec. 2 *(g)*]. It means every inquiry, other than a trial, conducted under the Code by a Magistrate or Court.

6. **Investigation** [Sec. 2 *(h)*]. It includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf.

The three terms 'investigation', 'inquiry' and 'trial' represent three different stages of a criminal case. In the first stage a police officer either on his own or under orders of a Magistrate investigates into a case. If he finds that no offence has been committed, he submits his report to the Magistrate who drops the proceedings. But if he finds that an offence has been committed, he sends the case to a Magistrate for a trial or an inquiry. This is the second stage of the case. The Magistrate may deal with the case himself and either convict the accused or discharge or acquit him. In serious offences the trial is before the Sessions Court, which may either convict or acquit the accused.

7. **Judicial proceeding** [Sec. 2 *(i)*]. It includes any proceeding in the course of which evidence is or may be legally taken on oath. it includes inquiry and trial but not investigation.

8. **Officer-in-charge of a police station** [Sec. 2 *(o)*]. "Officer-in-charge of a police station" includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable or, when the State Government so directs, any other police officer so present.

9. **Pleader** [Sec. 2 *(q)*]. With reference to any proceeding in any Court, 'pleader' means a person authorised by or under any law for the time being in force, to practise in such Court and includes any other person appointed with the permission of the Court to act in such proceeding.

10. **Police report** [Sec. 2 *(r)*]. It means a report forwarded by a police officer to a Magistrate under Sec. 173. Sec. 173 deals with 'Report of police officer on completion of investigation'.

11. **Police station** [Sec. 2 *(s)*]. It means any post or place declared generally or specially by the State Government to be a police station and includes any local area specified by the State Government in this behalf.

12. **Public prosecutor** [Sec. 2 *(u)*]. A public prosecutor means any person appointed under Sec. 24 and includes any person acting under the directions of a public prosecutor. See 24 deals with appointment of public prosecutors.

CONSTITUTION OF CRIMINAL COURTS

Classes of Criminal Courts (Sec. 6)

Besides the High Courts and the Courts constituted under any law other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely : —

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(1) Courts of Session ;

(2) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates ;

(3) Judicial Magistrates of the second class ; and

(4) Executive Magistrates.

The Supreme Court has also jurisdiction vested with certain criminal powers. Article 134 of the Constitution confers appellate jurisdiction on the Supreme Court in regard to criminal matters and an appeal lies to it from a judgment in a criminal proceeding of a High Court if the High Court—

(1) has on appeal reversed an order of acquittal of an accused person and sentenced him to death ; or

(2) has withdrawn for trial before itself any case from any subordinate Court and has thereafter convicted and sentenced the accused person to death ; or

(3) certifies that the case is a fit one for appeal to the Supreme Court.

POWERS OF COURTS

Courts by which offences are triable (Sec. 26)

Any offence under the Indian Penal Code, 1860 may be tried by—

(1) the High Court, or

(2) the Court of Session, or

(3) any other Court by which such offence is shown in the First Schedule to be triable.

Any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court and when no Court is so mentioned, may be tried by—

(1) the High Court, or

(2) any other Court by which such offence is shown in the First Schedule to be triable.

The power of a Court to try an offence is of course subject to the other provisions of the Code.

Sentences which Courts may award (Secs. 28 to 30)

High Courts and Sessions Judges (Sec. 28). A High Court may pass any sentence authorised by law. Sessions Judge or Additional Sessions Judge may pass any senetence authorised by law ; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years.

Magistrates (Sec. 29). The Court of a Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 7 years. The Court of a Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding 3 years, or of fine not exceeding Rs. 5,000, or of both. The Court of a Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding 1 year, or of fine not exceeding Rs. 1,000, or of both.

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The Court of a Chief Metropolitan Magistrate shall have the powers of the Court of a Chief Judicial Magistrate and that of a Metropolitan Magistrate, and the powers of the Court of a Magistrate of the first class.

Sentence of imprisonment in default of fine (Sec. 30). The Court of a Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law. The term of imprisonment must however

(a) not exceed the powers of the Magistrate under Sec. 29 ;

(b) not exceed, where imprisonment has been awarded as part of the substantive sentence, one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine .

The imprisonment awarded under Sec. 30 may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under Sec. 29.

ARREST OF PERSONS

When police may arrest without warrant (Sec. 41)

Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(1) who has been concerned in any cognizable offence or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned ; or

(2) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ; or

(3) who has been proclaimed as an offender either under this Code or by an order of the State Government ; or

(4) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing ; or

(5) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ; or

(6) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union ; or

(7) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India. The nature of the act should however be such that if it were committed in India, it would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India ; or

(8) who, being a released convict, commits a breach of any rule, relating to notification of residence of a released convict ; or

(9) for whose arrest any requisition, whether written or oral, has been received from another police officer. The requisition should specify the person to be arrested and the offence or other cause for which the arrest is to be

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made. Further it should appear from the requisition that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

Arrest on refusal to give name and residence (Sec. 42). A person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence may *(a)* refuse, on demand of such officer, to give his name and residence, or *(b)* give a name or residence which is false. The police office may arrest such a person in order that his name or residence may be ascertained. When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required. If his true name and residence cannot be ascertained within 24 hours from the time of arrest or he fails to execute the bond, or furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Arrest by private person and procedure on such arrest (Sec. 43). A private person may arrest or cause to be arrested *(a)* any person who in his presence commits a non-bailable and cognizable offence, or *(b)* any proclaimed offender. He shall, without unnecessary delay, make over or cause to be made over the person so arrested to a police officer. In the absence of a police officer, he shall take such person or cause him to be taken in custody to the nearest police station. The police officer shall re-arrest him if there is reason to believe that such person comes under the provisions of Sec. 41. Further if he refuses on the demand of the police officer to give his name and residence, or gives a name or residence which is false, he shall be dealt with under the provisions of Sec. 42. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Arrest by Magistrate (Sec. 44). When any offence is committed in the presence of an Executive or Judicial Magistrate within his local jurisdiction, he may himself arrest or order any person to arrest the offender. Upon such arrest, he may, subject to the provisions as to bail, commit the offender to custody. He may also at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue warrant.

Sec. 45 grants protection to members of the Armed-Forces from the arrest. According to it notwithstanding anything contained in Secs. 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government.

Arrest how made (Sec. 46). In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there be a submission to the custody by word or action. If such person forcibly resists endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest. Sec. 46 does not give a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

Sec. 47 empowers a person acting under a warrant of arrest or a police officer having authority to arrest to search the place where the person sought to be arrested may have entered. Sec. 48 empowers a police officer, for the purpose of arresting without warrant any person whom he is empowered to

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arrest, to pursue such person into any place in India. Sec. 49 lays down that the person arrested shall not be subjected to more restraint than is necessary to prevent his escape. Further Sec. 50 requires that the police officer or other person arresting any person without warrant shall forthwith communicate to the arrested person full particulars of the offence for which he is arrested or other grounds for such arrest.

Person arrested to be taken before Magistrate or officer-in-charge of police station (Sec. 56). A police officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions as to bail, take or send the person arrested before the Magistrate having jurisdiction in the case, or before the officer-in-charge of a police station.

Person arrested not to be detained for more than 24 hours (Sec. 57). No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Sec. 167, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Police to report apprehensions (Sec. 58). Officers-in-charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Discharge of person apprehended (Sec. 59). No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Power, on escape, to pursue and re-take (Sec. 60). If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in India. The provisions of Sec. 47 shall apply to arrest under Sec. 60 although the person making any such arrest is not acting under a warrant and is not a police officer having authority to arrest.

SUMMONS AND WARRANTS OF ARREST

Every summons issued by a Court under this Code shall be in writing and in duplicate. It shall be signed by the presiding officer of such Court or by such other officer as the High Court may, from time to time, by rules, direct. It shall also bear the seal of the Court (Sec. 61).

Service of summons

Summons how served (Sec. 62) . The summons shall be served by a police officer, or by an officer of the Court issuing it or other public servant. It shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Service of summons on corporate bodies and societies (Sec. 63). Service of a summons on a corporation may be effected by serving it on the secretary, local manager or other principal officer of the corporation. It may also be effected by letter sent by registered post, addressed to the chief officer of the corporation in India. In the latter case, the service shall be deemed to have been effected when the letter would arrive in the ordinary course of post.

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'Corporation' means an incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860.

Service when persons summoned cannot be found (Sec. 64). Sometimes the person summoned cannot, by the exercise of due diligence, be found. In such a case, the summons may be served by leaving one of the duplicates for the persons summoned with some adult male member of his family residing with him. The person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Procedure when service cannot be effected as before provided (Sec. 65). If service cannot by the exercise of due diligence be efected as provided above, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides. Thereupon the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper.

Warrant of arrest (Sec. 70). Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court . The warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Sometimes the Court may have reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed. In such a case, the Court may publish a written proclamation requiring the proclaimed offender to appear at a specified place and at a specified time not less than 30 days from the date of publishing such proclamation (Sec. 82).

The Court issuing a proclamation under Sec. 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable or both, belonging to the proclaimed person. Further where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment simultaneously with the issue of the proclamation [Sec. 83 (1)].

SEARCH WARRANTS

When search-warrant may be issued (Sec. 93). The Court may issue a search warrant in any of the following cases :

(1) where the Court has reason to believe that a person to whom a summons or order for production of documents or a requisition of postal articles, like letters and telegrams has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(2) where such document or thing is not known to the Court to be in the possession of any person, or

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(3) where the Court considers that the purpose of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection.

The person to whom such warrant is directed may search or inspect in accordance with the search-warrant.

The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend. The person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Sec. 93 does not authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or other thing in the custody of the postal or telegraph authority.

Search for person wrongfully confined (Sec. 97). A District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may have sometimes reason to believe that a person is confined under such circumstances that the confinement amounts to an offence. In such a case, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined. The search shall be made in accordance with the warrant. If the person is found in the search, he shall be immediately taken before the Magistrate, who shall make such order as in the circumstances of the case seems proper.

SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

Security for keeping the peace on conviction (Sec.106)

When a Court of Session or Court of a Magistrate of the first class convicts a person of any of the offences specified below or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace for such period, not exceeding 3 years, as it thinks fit.

The offences referred to in Sec. 106 are as follows :

(1) any offence punishable under Chapter VIII (which deals with offences against public tranquility) of the Indian Penal Code, 1860 ;

(2) any offence which consists of, or includes, assault or using criminal force or committing mischief ;

(3) any offence of criminal intimidation

(4) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.

If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

Security for keeping the peace in other cases (Sec. 107)

When an Executive Magistrate receives information that any person is likely to—

(a) commit a breach of the peace, or

(b) disturb the public tranquillity, or

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(c) do any wrongful act that may probably occasion a breach of the peace, or

(d) disturb the public tranquillity,

he may require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for the period not exceeding 1 year, as the Magistrate thinks fit. However before the Executive Magistrate proceeds under Sec. 107, he should be of opinion that there is sufficient ground for proceeding.

Proceedings under Sec. 107 may be taken before any Executive Magistrate when—

(a) either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction, or

(b) there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

MAINTENANCE OF PUBLIC ORDER AND TRANQUILLITY

Dispersal of assembly by use of civil force (Sec. 129). Any Executive Magistrate or officer-in-charge of a police station or, in the absence of such officer-in-charge, any police officer, not below the rank of a sub-inspector, may command any unlawful assembly, or any assembly of 5 or more persons likely to cause a disturbance of the public peace, to disperse. Upon such command being issued, it shall be the duty of the members of such assembly to disperse accordingly.

If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Executive Magistrate or police officer, may proceed to disperse such assembly by force. He may also, if necessary, arrest and confine the persons who form part of the assembly in order to disperse it or that they may be punished according to law.

Urgent cases of nuisance or apprehended danger (Sec. 144). Sometimes in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under Sec. 144 and immediate prevention or speedy remedy is desirable. In such a situation the Magistrate may, by a written order stating the material facts of the case and served in the prescribed manner, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management. The Magistrate will issue such a direction if he considers that such direction is likely to prevent, or tends to prevent, obstruct, annoy or cause injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity, or a riot, or an affray (disturbance, brawl, fight or breach of the peace).

An order under Sec. 144 may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*. It may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

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The order shall not however remain in force for more than 2 months from the making thereof.

PREVENTIVE ACTION OF THE POLICE

Police to prevent cognizable offences (Sec. 149). Every police officer may interpose for the purposes of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

Information of design to commit cognizable offences (Sec. 150). Every police officer receiving information of a design to commit any cognizable offence shall communicate such information to the police officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Arrest to prevent the commission of cognizable offence (Sec. 151). A police officer, knowing of a design to commit any cognizable offence, may arrest, without orders from the Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented. The arrested person shall not be detained in custody for a period exceeding 24 hours from the time of his arrest. He may be detained for a longer period if his further detention is required or authorised under any other provisions of this Code or of any other law for the time being in force.

Prevention of injury to public property (Sec. 152). A police officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property movable or immovable, or the removal or injury of any public landmark or buoy (a floating secured mark serving as a guide or as a warning) or other mark used for navigation.

INFORMATION TO POLICE

Information

Information in cognizable offences (Sec. 154). Every information relating to the commission of a cognizable offence may be given orally or in writing to an officer-in-charge of a police. If the information is given orally, it is shall be reduced to writing by the officer-in-charge of the police station or under his direction, and be read over to the informant. Every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it. Further the substance of the information shall be entered in a book to be kept by the officer-in-charge of the police station in such form as the State Government may prescribe in this behalf. A copy of the information as recorded above shall be given forthwith, free of cost, to the informant

Any person aggrieved by a refusal on the part of an officer-in-charge of a police station to record the information referred to in Sec. 154 may send the substance of such information, in writing and by post, to the Superintendent of Police concerned. If the Superintendent of Police is satisfied that the information discloses the commission of a cognizable offence, he shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code. The subordinate officer so appointed shall have all the powers of an officer-in-charge of the police station in relation to that offence.

Information in non-cognizable cases (Sec. 155). When information is given to an officer in charge of a police station of the commission within the limits

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of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer. The book shall be in such form as the State Government may prescribe in this behalf. Further the officer-in-charge of the police station shall refer the informant to the Magistrate.

A police officer shall not investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. On receiving an order of the Magistrate, he may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer-in-charge of a police station may exercise in a cognizable case.

Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

Investigation

Police officer's power to investigate cognizable case (Sec. 156). Any officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII (which deals with jurisdiction of the Criminal Courts in inquiries and trials). The proceedings of a police officer in any such case shall not at any stage be called in question on the ground that the case was one which such officer was not empowered under Sec. 156 to investigate.

Any Magistrate empowered under Sec. 190 (which deals with cognizance of offences by Magistrates) may order an investigation under Sec. 156.

Procedure of investigation (Sec. 157). If an officer-in-charge of a police station suspects the commission of an offence (which he is empowered under Sec. 156 to investigate), he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Further he shall proceed in person, or shall depute one of his subordinate officers to proceed to the spot to investigate the facts and circumstances of the case, and, if necessary to take measures for the discovery and arrest of the offender.

Report how submitted (Sec. 158). Every report sent to a Magistrate under Sec. 157 shall, if the State Government so directs, be submitted through such superior officer of police as the State Government, by general or special order, appoints in that behalf. The superior officer may give such instructions to the officer-in-charge of the police station as he thinks fit. Further he shall, after recording the instructions on the report, transmit the same without delay to the Magistrate.

Power to hold investigation or preliminary inquiry (Sec. 159). The Magistrate, on receiving the report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in the manner provided in this Code.

Police officer's power to require attendance of witnesses (Sec. 160). The police officer making an investigation may, by order in writing, require the attendance before himself of any person being within the limits of his own or

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any adjoining station who, from the information given or otherwise, appears to be acquainted with the facts and circumstances of the case ; and such person shall attend as so required. However a male person under the age of 15 years or a woman shall not be required to attend at any place other than the place in which such male person or woman resides. The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every person, attending under Sec. 160 at any place other than his residence.

Examination of witnesses by police (Sec. 161). The police officer making an investigation may examine orally any person supposed to be acquainted with the facts and circumstances of the case. Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. The police officer may reduce into writing any statement made to him in the course of an examination under Sec. 161 ; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

Statements to police not to be signed : Use of statements in evidence (Sec. 162). No statement made by any person to a police officer in the course of an investigation shall, if reduced to writing, be signed by the person making it. Further any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement of record, shall not be used for any purpose, save as provided in the Code, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. But when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Sec. 145 (which deals with 'cross-examination as to previous statement in writing') of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

No inducement to be offered (Sec. 163). No police officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement, threat or promise as is mentioned in Sec. 24 (which deals with 'confession caused by inducement, threat or promise, when irrelevant in criminal proceedings') of the Indian Evidence Act, 1872. But no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation any statement which he may be disposed to make of his own free will.

Recording of confessions and statements (Sec. 164)

Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial. But no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

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No compulsion to make confession. The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him. Further the Magistrate shall not record any confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily. If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

Manner of recording of confession. Any such confession shall be recorded in the manner provided in Sec. 281 for recording the examination of an accused person and shall be signed by the person making the confession ; and the Magistrate shall make a memorandum at the foot of such record to the following effect:

> I have explained to .....(name) that he is not bound to make a confession and that, if he does so, any confession he may make, may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (*Signed*) A.B.,
>
> Magistrate".

Recording of statement. Any statement (other than a confession) made under Sec. 164 shall be recorded in the manner provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

Forwarding of confession or statement. The Magistrate recording a confession or statement under Sec. 164 shall forward it to the Magistrate by whom the case is to be inquired into or tried.

Search by police officer (Sec. 165)

Whenever an officer-in-charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, he may, after recording in writing the grounds of his belief and specifying the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

Search in person. The police officer proceeding shall, if practicable, conduct the search in person. If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reason for so doing, require any officer subordinate to him to make the search. He shall deliver to the subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made ; and such subordinate officer may thereupon search for such thing in such place.

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CONDITIONS REQUISITE FOR INITIATION OF PROCEEDINGS

Cognizance of offences by Magistrate (Sec. 190). Any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf, may take cognizance of any offence—

(1) upon receiving a complaint of facts which constitute such offence ;

(2) upon a police report of such facts ;

(3) upon information received from any person other than a police officer that such offence has been committed ; or

(4) upon his own knowledge.

The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance of such offences as are within his competence to inquire into or try.

Transfer of application of the accused (Sec. 191) . When a Magistrate takes cognizance of an offence from a person other than a police officer or upon his own knowledge, the accused shall, before any evidence is taken, be informed that he is entitled to have the case inquired into or tried by another Magistrate. If the accused objects to further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate in this behalf.

Making over of cases to Magistrates (Sec. 192). The Chief Judicial Magistrate may, after taking cognizance of an offence, make over the case for inquiry or trial to any competent Magistrate subordinate to him.

Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance, of an offence, make over the case for inquiry or trial to such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify and thereupon such Magistrate may hold the inquiry or trial.

Cognizance of offences by Courts of Session (Sec. 193). Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

Additional and Assistant Session Judges to try cases made over to them (Sec. 194). An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or the High Court may, by special order, direct him to try.

Secs. 195 to 199 deal with prosecution for various offences. Sec. 195 deals with prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence. Sec. 196 deals with prosecution for offences against the State and for criminal conspiracy to commit such offences. Sec. 197 deals with prosecution of judges and public servants. Sec. 198 contains provisions relating to prosecution for offences against marriage and Sec. 199 deals with prosecution for defamation.

COMPLAINTS TO MAGISTRATES

Examination of complaint (Sec. 200). A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the

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witnesses present, if any. The substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. However when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint ; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Sec. 192.

Procedure by Magistrate not competent to take cognizance of the case (Sec. 201). If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall,—

(a) if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect ;

(b) if the complaint is not in writing, direct complainant to the proper Court.

Postponement of issue of process (Sec. 202). The Magistrate, on recipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Sec. 192 may, if he thinks fit, postpone the issue of process against the accused. Further he may inquire into the case either himself or direct an investigation to be made by a police officer or by such other person as he thinks fit. The inquiry or investigation shall be for the purpose of deciding whether or not there is sufficient ground for proceeding.

In an inquiry under Sec. 202, the Magistrate may, if he thinks fit, take evidence of witnesses on oath. However if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon complainant to produce all his witnesses and examine them on oath. If an investigation under Sec. 202 is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer-in-charge of a police station. But he does not have the power to arrest without warrant.

Dismissal of complaint (Sec. 203). If, after considering the statement on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Sec. 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. In every case of dismissal, the Magistrate shall briefly record his reasons for so doing.

COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

Issue of process (Sec. 204). If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before him.

It is important to note that no summons or warrant shall be issued against the accused under Sec. 204 until a list of the prosecution witnesses has been filed.

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Further in a proceeding instituted upon complaint made in writing, every summons or warrant issued under Sec. 204 shall be accompanied by a copy of such complaint.

Dispensing with Personal attendance (Sec. 205). Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. But the Magistrate inquiring into or trying the case, may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance

Sec. 206 deals with special summons in case of petty offences. Sec. 207 makes provision of supply to the accused of copy of the police report and other documents. Sec. 208 makes provision for supply of copies of statements and documents to the accused in other cases triable by Court of Session. Sec. 209 deals with commitment of a case to Court of Session when offence is triable exclusively by it.

THE CHARGE

Contents of charge (Sec. 211). Every charge under this Code shall state the offence with which the accused is charged. If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

Particulars as to time, place and person (Sec. 212). The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against, or the thing (if any) in respect of which it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

Words in charge taken in sense of law under which offence is punishable (Sec. 214). In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Effect of errors (Sec. 215). No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Court may alter charge (Sec. 216). Any Court may alter or add to any charge at any time before judgment is pronounced. Every such alteration or addition shall be read and explained to the accused.

Separate charges for distinct offences (Sec. 218). For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately. But where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.

Trial for more than one offence (Sec. 220). If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

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Persons accused of the same offence or different offences committed in the course of the same transaction and persons accused of abetment of, or attempt to commit, such offence may be charged and tried together (Sec. 223).

PERSON ONCE CONVICTED OR ACQUITTED NOT TO BE TRIED FOR SAME OFFENCE (Sec. 300)

A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, when such conviction or acquittal remains in force, not be liable to be tried again for the same offence. Likewise he shall not be tried on the same facts for any other offence for which a different charge from the one made against him might have been made under Sec. 221 or for which he might have been convicted under Sec. 221. A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted by a different offence from that of which he was convicted, may be afterwards tried for the last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

A person discharged under Sec. 258 (*i.e.*, a summons-case where there is judgment of acquittal by Judicial Magistrate) shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first mentioned Court is subordinated.

Examples. (a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or, upon the same facts, with theft simply or with criminal breach of trust.

(b) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. *A* may be tried again for culpable homicide.

(c) A is charged before the Court of Session and convicted of the culpable homicide of B. *A* may not afterwards be tried on the same facts for the murder of *B*.

(d) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to *B*. *A* may not afterwards be tried for voluntarily causing grievous hurt in *B* on the same facts.

(e) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of *B*. *A* may subsequently be charged with, and tried for robbery on the same facts.

(f) A, B and *C* are charged by a Magistrate of the first class with, and convicted by him of, robbing *D*. *A, B* and *C* may afterwards be charged with, and tried for dacoity on the same facts.

THE JUDGMENT

Judgment (Sec. 353). The judgment in every trial in any Criminal Court of original juridiction shall be pronounced in open Court by the presiding officer. It shall be pronounced immediately after termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. Further, it shall be pronounced—

(a) by delivering the whole of the judgment ; or

(b) by reading out the whole of the judgment ; or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

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If the accused is in custody, he shall be brought up to hear the judgment pronounced.

Language and contents of judgment (Sec. 354). Except as otherwise expressly provided by this Code, every judgment referred to in Sec. 353,—

(a) shall be written in the language of the Court ;

(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision ;

(c) shall specify the offence (if any) of which, and the Section of the Indian Penal Code, 1860 or other law under which the accused is convicted and the punishment to which he is sentenced ;

(d) if it be judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

Metropolitan Magistrate's judgment (Sec. 355). Instead of recording a judgment in the manner herein before provided, a Metropolitan Magistrate shall record the following particulars, namely—

(1) the serial number of the case ;

(2) the date of the commission of the offence ;

(3) the name of the complainant (if any) ;

(4) the name of the accused person, and his parentage and residence ;

(5) the offence complained of or proved ;

(6) the place of accused and his examination (if any) ;

(7) the final order ;

(8) the date of such order ;

(9) in all cases in which an appeal lies from the final order either under Sec. 373 or under Sec. 374, a brief statement of the reasons for the decision.

Court not to alter judgment (Sec. 362). Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.

Copy of judgment to be given to the accused and other persons (Sec. 363). When the accused is sentenced to imprisonment, a copy of the judgment shall, immediately after the pronouncement of the judgment, be given to him free of cost.

APPEALS

No appeal to lie unless otherwise provided (Sec. 372). No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Appeal in case of acquittal (Sec. 378). In case of an acquittal the State Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court

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other than a High Court or an order of acquittal passed by the Court of Session in revision.

Appeal against conviction by High Court in certain cases (Sec. 379). Where the High Court has, on appeal, reversed an order of acquittal of an accused person and convicted him and sentenced him to death or to imprisonment for life or to imprisonment for a term of 10 years or more, he may appeal to the Supreme Court.

Petition of appeal (Sec. 382) . Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against.

Procedure when appellant in jail (Sec. 383). If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

Summary dismissal of appeal (Sec. 384) . If upon examining the petition of appeal and copy of the judgment received under Sec. 382, or Sec. 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily. But

(1) no appeal presented under Sec. 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same ;

(2) no appeal presented under Sec. 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case ;

(3) no appeal presented under Sec. 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

Powers of the Appellate Court (Sec. 386). After perusing of the record and hearing the parties, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(1) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(2) in an appeal from a conviction—

(a) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent juridiction subordinate to such Appellate Court or committed for trial, or

(b) alter the finding, maintaining the sentence, or

(c) with or without altering the finding, alter the nature or the extent of the sentence but not so as to enhance the same ;

(3) in an appeal for enhancement of sentence —

(a) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court competent to try the offence, or

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(b) alter the finding maintaining the sentence, or

(c) with or without altering the finding, alter the nature or the extent of the sentence, so as to enhance or reduce the same ;

(4) in an appeal from any other order, alter or reverse such order ;

(5) make any amendment or any consequential or incidental order that may be just or proper.

The sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement. Further the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

Appellate Court may take further evidence or direct it to be taken (Sec. 391). In dealing with any appeal under the Chapter dealing with 'Appeals' (Secs. 372 to 394), the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

REFERENCE AND REVISION

Reference to High Court (Sec. 395). Sometimes a Court may be satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, Ordinance or Regulation. If the determination of such question is necessary for the disposal of the case, and the Court is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, it shall state a case setting out its opinion and the reasons therefor, and refer the same for the decision of the High Court.

In Sec. 395, 'Regulation' means any Regulation as defined in the General Clauses Act, 1987 or in the General Clauses Act of a State.

High Court's powers of revision (Sec. 401). In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Secs. 386, 389, 390 and 391 or on a Court of Session by Sec. 307. If the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Sec. 392. No order under Sec. 401 shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

Power of High Court to withdraw or transfer revision cases (Sec. 402). Sometimes one or more persons convicted at the same trial may make application to a High Court for revision and any other person convicted at the

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same trial may make an application to the Sessions Judge for revision. In such a case the High Court shall decide, having regard to the general convenience of the parties and the importance of the questions involved, which of the two Courts should finally dispose of the applications for revision. When the High Court decides that all the applications for revision should be disposed of by itself, the High Court shall direct that the applications for revision pending before the Sessions Judge be transferred to itself. Where the High Court decides it is not necessary for it to dispose of the applications for revision, it shall direct that the applications for revision made to it be transferred to the Sessions Judge.

PROVISIONS AS TO BAIL AND BONDS

In what cases bail to be taken (Sec. 436). When any person, other than a person accused of a non-bailable offence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail. The officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance at any stage of investigation or inquiry.

When bail may be taken in case of non-bailable offence (Sec. 437). When any person accused of, or suspected of the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail. But such person shall not be so released—

(1) if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life ;

(2) if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for 7 years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence.

The Court may direct that the person referred to above be released on bail if such person is under the age of 16 years or is a woman or is sick or infirm. Further the Court may also direct that a person referred to in Clause (2) be released on bail if it is satisfied that it is just and proper so to do for any other special reason.

Direction for grant of bail to person apprehending arrest (Sec. 438). When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under Sec. 438. The High Court or the Court of Session may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail. This bail is called 'anticipatory bail.'

Amount of bond and reduction thereon (Sec. 440). The amount of every bond executed under the Chapter dealing with 'Provisions as to bail and bonds' (Secs.436 to 450) shall be fixed with due regard to the circumstances of the case and shall not be excessive . The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

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Bond of accused and sureties (Sec.441). Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person. When such person is released on bail, the sureties shall ensure that such person shall attend at the time and place mentioned in the bond, and shall contunue so to attend until otherwise directed by the police officer or Court, as the case may be.

Discharge from custody (Sec. 442). As soon as the bond has been executed, the person for whose appearance it has been executed shall be released. When such person is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the orders shall release him.

Discharge of sureties (Sec. 44). All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as it relates to the applicant. On such aplication being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him. On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicants. Further the Court shall call upon such person to find other sufficient sureties, and if, he fails to do so, may commit him to jail.

Deposit instead of recognizance (Sec. 445). When any person is required by any Court or officer to execute a bond with or, without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes of such amount as the Court or officer may fix in lieu of executing such bond.

Procedure in case of insolvency or death of surety or when a bond is forfeited (Sec. 447). When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forefeited under the provisions of Sec. 446, the Court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order. If the security is not furnished, the Court or Magistrate may proceed as if there had been a default in complying with such original order.

Bond required from minor (Sec. 448). When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.

SUMMARY TRIALS

Power to try summarily (Sec. 260)

The object of summary trial is to ensure speedy trial of some minor offences by dispensing with formalities or delay in proceedings. The question whether a case may be tried summarily by a Magistrate is a matter of discretion of the Magistrate, which is to be judicially exercised with due care and on consideration of the circumstances of the case.

Any Chief Judicial Magistrate, Metropolitan Magistrate, or Magistrate of the first class specially empowered in this behalf by the High Court, may, if

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he thinks fit, try some of the offences in summary way. These offences may be as follows :

(1) offences not punishable with dealth, imprisonment for life or imprisonment for a term exceeding 2 years ;

(2) theft where the value of the property stolen does not exceed Rs. 200 ;

(3) receiving or retaining stolen property where the value of property does not exceed Rs. 200 ;

(4) assisting in the concealment or disposal of stolen propery, where the value of such property does not exceed Rs. 200 ;

(5) offences under Secs. 454 and 456 of the Indian Penal Code, 1860 ;

(6) insult with intent to provoke a breach of the peace, and criminal intimidation ;

(7) abetment of any of the foregoing offences ;

(8) an attempt to commit any of the foregoing offences, when such attempt is an offence ;

(9) any offence constituted by an act in respect of which a complaint may be made under Sec. 20 of the Cattle Trespass Act, 1871.

When, in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by this Code.

Summary trial by Magistrate of the second class (Sec. 261)

The High Court may confer on any Magistrate invested with the powers of a Magistrate of the second class power to try summarily any offence which is punishable only with fine or with imprisonment for a term not exceeding 6 months with or without fine, and any abetment of or attempt to commit any such offence.

Procedure for summary trials (Sec. 262). In summary trials the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned. Further, no sentence of imprisonment for a term exceeding 3 months shall be passed in the case of any conviction under summary trials.

Record in summary trials (Sec. 263). In every case tried summarily, the Magistrate shall enter, in such form as the State Government may direct, the following particulars, namely :

(1) the serial number of the case ;

(2) the date of commission of the offence ;

(3) the date of the report or complaint ;

(4) the name of the complainant (if any) ;

(5) the name, parentage and residence of the accused ;

(6) the offence complained of and the offence (if any) proved, and in cases of theft of property, receiving of such property, etc., the value of the property in respect of which the offence has been committed ;

(7) the plea of the accused and his examination (if any) ;

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(8) the finding ;

(9) the sentence or other final order ;

(10) the date on which proceedings terminated.

Judgment (Sec. 264). In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding. The concerned Magistrate shall sign such record and judgment.

LIMITATION FOR TAKING COGNIZANCE OF CERTAIN OFFENCES

For the purposes of limitation, unless the context otherwise requires, 'period of limitation' means the period specified in Sec. 468 for taking cognizance of an offence (Sec. 467).

Bar to taking cognizance after lapse of the period of limitation (Sec. 468). No Court shall take cognizance of an offence after the expiry of the period of limitation. This is however subject to other provisions in the Code.

The period of limitation shall be—

(1) 6 months, if the offence is punishable with fine only ;

(2) 1 year, if the offence is punishable with imprisonment for a term not exceeding 1 year ;

(3) 3 years, if the offence is punishable with imprisonment for a term exceeding 1 year but not exceeding 3 years.

The period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.

Commencement of period of limitation (Sec. 469). The period of limitation, in relation to an offender, shall commence,—

(1) on the date of the offence ; or

(2) where the commission of the offence was not known to the person aggrieved by the offence or to any police officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier ; or

(3) where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the police officer making investigation into the offence, whichever is earlier.

In computing the period of limitation the day from which such period is to be computed shall be excluded.

Exclusion of time in certain cases (Sec. 470). In computing the period of limitation, the following time/period shall be excluded :

(1) The time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender. But no such exclusion shall be made unless the prosecution relates to the same facts and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

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(2) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, the period of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn.

(3) Where notice of prosecution for an offence has been given, or where, under any law for the time being in force, the previous consent or sanction of the Government or any other authority is required for the institution of any prosecution for an offence then the period of such notice or, as the case may be, the time required for obtaining such consent or sanction.

(4) The time during which an offender—

(a) has been absent from India or from any territory outside India which is under the administration of the Central Government ; or

(b) has avoided arrest by absconding or concealing himself.

Exclusion of date on which Court is closed (Sec. 471). Where the period of limitation expires on a day when the Court is closed, the Court may take cognizance on the day on which the Court re-opens.

Continuing offence (Sec. 472). In the case of a continuing offence, a fresh period of limitation shall begin to run at every moment of the time during which the offence continues.

Extension of period of limitation in certain cases (Sec. 473). Notwithstanding anything contained in the foregoing provisions of the Chapter dealing with 'Limitation for taking cognizance of certain offences' (Secs. 467 to 473), any Court may take cognizance of an offence after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interests of justice.

TEST QUESTIONS

1. What is the object of the Criminal Procedure Code, 1973 ?
2. What is an 'offence' under the Criminal Procedure Code, 1973 ?
3. What are *(a)* cognizable and non-cognizable offences and *(b)* continuing offences.
4. Discuss provisions relating to searches under the Criminal Procedure Code, 1973.
5. Distinguish between :
   (i) Bailable and non-bailable offences. *(C.S.E. December 1986, 1989, 1991)*
   (ii) Cognizable and non-cognizable offences. *(C.S.E. June 1987, 1988, 1991 1993 ; December 1989)*
   (iii) Summons case and warrants case *(C.S.E. December 1991)*
6. What is the limitation prescribed in the Criminal Procedure Code, 1973 for taking cognizance in certain offences ? *(C.S.E, December 1989, June 1993)*
7. Write short notes on :
   (a) Summons and warrants of arrest. *(C.S.E. December 1990)*
   (b) Search warrants.
   (c) Maintenance of public order and tranquillity.
   (d) Summary trials.

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(e) Limitation for taking cognizance of certain offences.

(f) Bail.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *X* commits an offence under Indian Penal Code which is punishable with imprisonment for a term not exceeding 1 year. A complaint is made against *X* after 15 months of committing the offence. Can the Court take cognizance of the offence ? *(C.S.E. December 1987)*

[**Hint :** No, Sec. 468].

2. *A* alleges that *B* has committed some offences. The majority of them are non-cognizable. The station house officer of the police station waints to treat the case as cognizable. Can this be challenged ? *(C.S.E. December 1990)*

[**Hint :** No, Sec. 2 *(c)*].

3. *X* commits an offence by causing injury to *Y*, punishable under Sec. 323 of the Indian Penal Code, which is punishable for a term of 1 year or with a fine of Rs. 1,000. *Y* makes a complaint to the Court of the Metropolitan Magistrate against *X* after 10 months of the commission of the offence. Can the said Court take cognizance of that offence ? *(C.S.E. June 1989)*

[**Hint :** Yes, Sec.468].

4. A moves an application for anticipatory bail before a Judicial Magistrate (1st Class) of the area for a bailable offence. Can *A* get anticipatory bail? *(C.S.E., June 1991, 1988)*

[**Hint :** No, anticipatory bail is granted in case of a non-bailable offence (Sec. 438)].

5. *A* commits the offence of theft by stealing property of *B* worth Rs. 500. Can this offence be tried summarily by the Chief Judicial Magistrate ? *(C.S.E. June 1988)*

[**Hint :** No. Sec. 260].

6. A goes to the police station and informs about the commission of a cognizable offence. What will be the duties of a police officer ? *(C.S.E. June 1991)*

[**Hint :** Refer to Secs. 154 and 157].

7. A committed an offence punishable with imprisonment upto 3 years in 1983. Immediately thereafter he went to U.S.A. and returned to India in 1992. The police arrested *A* and submitted a challan against him before a Magistrate in 1993. Can the Magistrate now take cognizance in the matter ? *[C.S.E. June 1992, (modified)]*

[**Hint :** Yes. (Sec. 470)].

8. *A* is awarded punishment of rigorous imprisonment for 2 years by a Judicial Magistrate. *A* is also asked to execute security bond for keeping peace for 2 years. After undergoing this sentence, *A* submits an application with a prayer for his release on the ground that he has already suffered imprisonment for 2 years. Will *A* succeed ? *(C.S.E. December 1992)*

[**Hint :** No. Sec.119].

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7

The Indian Evidence Act, 1872

Object of the Law of Evidence

The law of evidence may be defined as a system of rules for ascertaining controverted questions of facts in judicial inquiries. It bears the same relation to a judicial investigation as logic to reasoning. The substantive law, whether it be statute law or common law, merely defines what *facts* go to constitute a right or a liability. The inquiry into these facts is regulated by a set of rules and principles which go by the name of law of evidence.

In any litigation, the parties to that litigation seek to establish their respective rights. It is the duty of the Court to ascertain facts about which the parties are at issue. The word 'evidence' signifies, in its original sense, the state of being evident, *i.e.*, plain, apparent, clear to understanding, or notorious. But it is applied to that which tends to generate proof, or something legally submitted to a Court or tribunal to ascertain the truth of a matter. Facts brought forward by the parties to support their respective claims are evidence and they have to be proved to the satisfaction of the Court. All facts brought forward by the parties may not be relevant to the controverted question in the case. Further, even some relevant facts are excluded from the judicial process on the grounds of public policy, expediency and convenience.

The Indian Evidence Act, 1872 is an Act to consolidate, define and amend the law of evidence. Though the Act is a consolidating statute, yet it is not exhaustive. In addition to the general rules of evidence provided in the Act, there are other rules of evidence dealing with special subjects in different statutes like the Prevention of Food Adulteration Act, 1954 and the Code of Criminal Procedure, 1973.

The object of the Evidence Act is to prevent mischief in admission of evidence by enacting correct and uniform rules of practice. The main principles underlying the Act are :

(i) evidence must be pinned down to matter in issue ;

(ii) best possible evidence must be tendered ; and

(iii) hearsay evidence must be kept out or disregarded.

Evidence is generally divided into three categories—

(1) oral or personal,

(2) documentary,

(3) material.

Sec. 3 of the Act only recognizes the first two categories of evidence. *Oral evidence* means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under

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inquiry. *Documentary evidence* means and includes all documents produced for the inspection of the Court. *Real* or *material* evidence is supplied by material object for inspection of the Court like the weapon of offence, etc. Although Proviso to Sec. 60 of the Act allows production of material evidence yet under the Act such material, strictly speaking, is not 'evidence'.

For the purpose of evidence, facts are divided into (1) facts in issue, and (2) relevant facts. The facts which are constituents of a litigated right, liability, or disability are called *facts in issue* (Sec. 3). What are or may be such facts depends on the substantive law in the particular litigation. In order to prove the existence or non-existence of facts in issue, certain other interconnected facts may be given in evidence. These are termed as *relevant facts* (Sec. 5).

The rules of evidence for civil and criminal cases are, in general, the same, but there is a marked difference in the effect of evidence in civil and criminal cases. In a civil case a mere preponderance of probability is a sufficient basis of decision and hence Courts can decide on balance of probability. In a criminal case the fundamental principle is that "it is better that ten guilty men should escape than one innocent man should suffer". Acting on this principle Courts insist on a higher degree of proof in criminal cases. Even if it is not a rule of law, it is a rule of prudence founded on public policy.

Extent

The Act extends to the whole of India except the State of Jammu and Kashmir and applies to all judicial proceedings in or before any Court, including Court Martial. It does not extend to—

(a) Court Martial under the Army Act, 1950, the Naval Discipline Act, or the Indian Navy (Discipline) Act, 1934, or the Air Force Act,

(b) Affidavits presented to any Court or officer,

(c) Proceedings before an arbitrator (Sec. 1, Para 2).

The Act came into force on 1st day of September, 1872 (Sec.1, Para 3).

Reference to Sections

Unless otherwise indicated, reference to Sections in this Chapter is to the Indian Evidence Act, 1872.

INTERPRETATION CLAUSE
(Sec. 3)

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context (Sec. 3).

Court. Court includes all Judges and Magistrates, and all persons, except arbitrators, legally authorised to take evidence.

Fact. Fact means and includes—

(1) anything, state of things, or relation of things, capable of being perceived by the senses ;

(2) any mental condition of which any person is conscious.

Examples. (a) That there are certain objects arranged in a certain place, is a fact.

(b) That a man heard or saw something, is a fact.

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(c) That a man said certain words, is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation, is a fact.

Relevant. One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts. Chapter II (Secs. 5 to 55) of Part I of the Act deals with 'Relevancy of Facts'.

Facts in issue. The expression 'facts in issue' means and includes—Any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability asserted or denied in any suit or proceeding, necessarily follows.

Explanation. Whenever under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Example. A is accused of the murder of *B*.

At his trial the following facts may be in issue :

That *A* caused *B*'s death ;

That *A* intended to cause *B*'s death ;

That *A* had received grave and sudden provocation from *B* ;

That *A*, at the time of doing the act which caused *B*'s death, was, by reason of unsoundness of mind, incapable of knowing its nature.

Document. It means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used, or which may be used, for the purpose of recording that matter.

Examples. (a) A writing is a document.

(b) Words printed, lithographed or photographed are documents.

(c) A map or plan is a document.

(d) An inscription on a metal plate or stone is a document.

(e) A caricature is a document.

Evidence. 'Evidence' means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry ; such statements are called *oral evidence ;*

(2) all documents produced for the inspection of the Court ; such documents are called *documentary evidence.*

Proved. A fact is said to be proved when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

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Disproved. A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

Not proved. A fact is said not to be proved when it is neither proved nor disproved.

India. 'India' means the territory of India excluding the State of Jammu and Kashmir.

PRESUMPTIONS

'May presume', 'shall presume', 'conclusive proof (Sec. 4)

May presume. Whenever it is provided by this Act that the Court *may* presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

Shall presume. Whenever it is directed by this Act that the Court *shall* presume a fact, it shall regard such fact as proved, unless and until it is disproved.

Conclusive proof. When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Presumption is a legal inference which, relating to the existence or non-existence of a certain fact, is drawn by a process of probable reasoning or sometimes as a rule of law (public policy) from something proved or taken for granted. In other words, presumption is an inference drawn from the known or proved existence of some other facts. It is a rule which treates an unknown fact as proved on proof or admission of certain other facts.

There are 2 kinds of presumptions—

(1) Presumptions of fact or natural presumption, and

(2) Presumptions of law or artificial presumptions.

Presumptions of fact are inferences which the mind naturally and logically draws from given facts without the help of legal directions. They are in the nature of 'may presume'. The Court has discretion to draw or note to draw inferences. They are generally rebuttable on evidence of contrary proof [*Amal Chandra Datt* v. *Second Addl. D.J.*, A.I.R. (1989) S.C. 255]. They are also known as *natural presumptions*. One of the finest examples of a natural presumption is incorporated in Sec. 114 which runs as follows :

> "*Court may presume existence of certain facts.* The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."
>
> *Examples.* The Court may presume—
>
> *(a)* that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

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(b) that an accomplice is unworthy of credit, unless he is corroborated in material particulars ;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence ;

(e) that judicial and official acts have been regularly performed ;

(f) that the common course of business has been followed in particular cases ;

(g) that evidence which could be and is not produced would, if produced, be favourable to the person who withholds ;

(h) that if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i) that when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

Presumptions of law are arbitrary inferences which the law expressly directs the judge to draw from particular facts. They are also known as *artificial presumptions*. They are in the nature of 'shall presume' and 'conclusive proof'. They are always obligatory. The 'shall presume' category of presumptions are either rebuttable or irrebuttable. Sec. 89 is a good illustration of "shall presume". According to it, the Court *shall presume* that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law. On the other hand 'conclusive proof' category of presumptions are irrebuttable presumptions of law and are based on concommitant variables. No evidence is allowed to combat their effect. But strictly speaking even these presumptions are rebuttable, but the only way to rebut them is provided by the law. Sec. 112 is an example of "conclusive proof" and it should be noted that the only way to rebut the presumption raised is also provided in the Section itself. Sec. 112 is reproduced below :

"*Birth during marriage, conclusive proof of legitimacy.* The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be *conclusive proof* that he is the legitimate son of that man, *unless* it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

RELEVANCY OF FACTS

The definition of the term 'relevant' in Sec. 3 mentions that a fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of the Act relating to the relevancy of facts. Facts declared to be relevant are those which are in the eyes of law so connected with the facts in issue that they render the latter probable or improbable.

Secs. 5 to 55 deal with the relevancy of facts. The Evidence Act follows the principle of exclusion and elimination. Therefore evidence can be led only of *(a)* facts in issue, and *(b)* relevant facts and of no other facts.

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An important thing to remember here is that all facts which are covered under Secs. 5-55 become relevant facts, in so far as they are only admissible in the Court. Merely because a fact is relevant does not prove or disprove a fact. Therefore this context must not be lost during study of these Sections.

Evidence may be given of relevant facts and facts in issue (Sec. 5)

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant, and of no others.

Example. *A* is tried for the murder of *B* by beating him with a club with the intention of causing his death. At *A*'s trial the following facts are in issue :

A's beating *B* with a club ;

A's causing *B*'s death by such beating ;

A's intention to cause *B*'s death.

Relevant facts are arranged in the Act under Secs. 6 to 55 in a particular scheme which is as follows :

(1) Things connected with facts in issue as part of the same transaction like occasion, cause, effect, motive, conduct etc. (Secs. 6 to 16).

(2) Things said about facts in issue like admission, confessions, etc. (Secs. 17 to 31).

(3) Statements by persons who cannot be called as witnesses (Secs. 32 and 33).

(4) Statements made under special circumstances (Secs. 34 to 38).

(5) How much of a statement is to be proved (Sec. 39).

(6) Things decreed in Courts like judgments of other cases (Secs. 40 to 44).

(7) Opinions of third persons when relevant (Secs. 45 to 51).

(8) Character or reputation of parties when relevant (Secs. 52 to 55).

This categorisation of relevant facts does not make the facts mutually exclusive. A fact can be relevant under one or more categories. For example. the cause or the motive of an act is also part of previous conduct or that statement made under special circumstances may also be the effect of an act.

RES GESTAE

Res gestae in short means surrounding or accompanying circumstances which are inseparable from the facts in issue and are necessary to explain the nature of the main act. They include acts or declarations accompanying or explaining the transaction or fact in issue. The area of events covered by *res gestae* depends upon the circumstances of each case.

Relevancy of facts forming part of the same transaction (Sec. 6)

Sec. 6 lays down the requirement that the interconnection between facts in issue and other connected facts must be such that they form part of the same transaction. A transaction may be defined as a group of facts so connected together so as to be referred to by a single legal name as a crime or a contract, a wrong or any other subject of inquiry which may be in issue.

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Where a transaction consists of different acts, they must be connected together by proximity of time, proximity or unity of place, continuity of action and community of purpose or design [*Hadu* v. *State*, A.I.R. (1950) Cut. 509]. Sec. 6 runs thus :

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether thay occurred at the same time and place or at different times and places."

Examples. (a) *A* is accused of the murder of *B* by beating him. Whatever was said or done by *A* or *B* or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) *A* is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and goods are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though *A* may not have been present at all of them.

(c) *A* sues *B* for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is, whether certain goods ordered from *B* were delivered to *A*. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Facts which are the occasion, cause or effect of facts in issue (Sec. 7)

Sec. 7 contains 5 modes of interconnection by which facts can be admitted as relevant facts. It is a specific application of Sec. 6. These 5 modes are really different aspects of causation. They are :

(1) occasion,
(2) cause,
(3) effect,
(4) opportunity, and
(5) state of things.

Sec.7 runs thus :

"Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant".

Examples. (a) The question is, whether *A* robbed *B*. The facts that, shortly before the robbery, *B* went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons are relevant.

(b) The question is, whether *A* murdered *B*. Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether *A* poisoned *B*. The state of *B*'s death before the symptoms ascribed to poison, and habits of *B*, known to *A*, which afforded an opportunity for the administration of poison, are relevant facts.

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Motive, preparation and previous or subsequent conduct (Sec. 8)

Sec. 8 which deals with 'motive', 'preparation' and 'previous or subsequent conduct' provides as follows :

"Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. The word 'conduct' in this Section does not include statements, unless these statements accompany and explain acts other than statements, but this explanation is not to affect the relevancy of statements under any other Section of this Act.

Explanation 2. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant".

Examples. (a) A is tried for the murder of *B*. The facts that *A* murdered *C*, that *B* knew that *A* had murdered *C*, and that *B* tried to extort money from *A* by threatening to make his knowledge public, are relevant.

(b) A sues *B* upon a bond for the payment of money. *B* denies the making of the bond. The fact that, at the time when the bond was alleged to be made, *B* required money for a particular purpose, is relevant.

(c) A is tried for the murder of *B* by poison. The fact is that, before the death of *B*, *A* procured poison similar to that which was administered to *B*, is relevant.

(d) The question is, whether a certain document is the will of *A*. The facts that, not long before the date of the alleged will, *A* made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to prepared of which he did not approve, are relevant.

(e) A is accused of a crime. The facts that, either before or at the time of, or after the alleged crime, *A* provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned (bribed or induced to commit prejury or other unlawful act) persons to give false evidence respecting it, are relevant.

(f) The question is, whether *A* robbed *B*. The facts that, after *B* was robbed, *C* said in *A*'s prefsence—"the police are coming to look for the man who robbed *B*", and that immediately afterwards *A* ran away, are relevant.

(g) The question is, whether *A* owes *B* Rs. 10,000. The facts that *A* asked *C* to lend him money, and that *D* said to *C* in *A*'s presence and hearing—"I advise you not to trust *A*, for he owes *B* Rs. 10,000", and that *A* went away without making any answer, are relevant facts.

Motive is that which induces or moves a person to act in a certain way (*Gangaram* v. *Emperor*, 22 Cr.L.J. 529). It is the emotion supposed to have led to the act. There can be no action without a motive, which must exist for every

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voluntary act. The mere existence of motive is by itself not an incriminating circumstances. In *Tara Devi* v. *State of U.P.*, A.I.R. (1991) S.C. 342, it was held that motive of a woman to get rid of her husband was not enough to convict particularly when her paramour was acquitted. It is sometimes difficult to prove motive by direct evidence and hence it is sought to be established by circumstantial evidence, namely, the conduct of the person. Motive may be undiscoverable but the failure to discover it does not signify its non-existence. It assumes more importance when the case rests only on circumstantial evidence. In criminal law it is necessary to prove the intention of the person which constitutes the *mens rea* of the crime ; motive may also be relevant from the point of view of evidence. The difference between motive and intention is that motive is the reason which induces a person to do an act, while intention shows the nature of the said act. Adequacy of motive is of little importance.

Preparation means the means and measures necessary for the commission of any offence. Every crime has four stages—formation of motive, preparation, attempt to commit the crime and actual commission of crime. Premeditated crime is necessarily preceded by appropriate preparation. Preparation on the part of the accused to accomplish the crime, or to prevent its discovery or to aid his escape or to avert suspicion are relevant on the question of his guilt.

Conduct must, whether previous or subsequent, have reference to the suit or proceeding or to facts in issue or relevant facts and influence or be influenced by facts in issue or relevant facts. Therefore any conduct which is directly and immediately influenced by a fact in issue or relevant fact is relevant. For example, the following facts are relevant in a criminal inquiry :

(a) accused's conduct shortly before or the after the commission of offence which influenced or was influenced by his commission ;

(b) statements made by him which accompany and explain such conduct ;

(c) statements made to him or in his presence and hearing of which affects his conduct.

Facts necessary to explain or introduce relevant facts (Sec. 9)

Sec. 9 makes the following facts relevant, *i.e.*, facts

(1) which are necessary to explain or introduce a fact in issue or relevant fact, or

(2) which support or rebut an inferrence suggested by a fact in issue or relevant fact, or

(3) which establish the identity of a person or thing wnose identity is relevant, or

(4) which fix the time or place at which any fact in issue or relevant fact happened, or

(5) which show the relation of parties by whom any fact in issue or relevant fact was transacted, in so far as they are necessary for that purpose.

Sec. 9 runs thus :

"Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which

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establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant is so far as they are necessary for that purpose."

Examples. (a) The question is, whether a given document is the will of *A*. The state of *A*'s property and of his family at the date of the alleged will may be relevant facts.

(b) A sues *B* for a libel imputing disgraceful conduct to *A* ; *B* affirms that the matter alleged to be libellous is true. The position and relation of parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

(c) A sues *B* for inducing *C* to break a contract of service made by him with *A*. *C*, on leaving *A*'s service, says to *A*, "I am leaving you because *B* has made me a better offer". This statement is a relevant fact as explanatory of *C*'s conduct which is relevant as a fact in issue.

One of the methods of establishing the identity of the accused is "test identification parade". Its evidence is received under this Section. The idea of the parade is to test the veracity of the witness on the question of his capability to identify, from among several persons made to stand in a queue, an unknown person whom the witness has seen at the time of the occurrence [*Chaman* v. *State of U.P.*, A.I.R. (1992) S.C. 601].

ADMISSIONS
(Secs. 17 to 23)

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact. It is made by any of the persons, and under the circumstances, set out in Secs. 18 to 23 (Sec.17).

The most generally accepted ground for reception of admisssion in evidence is that the party's declarations, whether for or against his interest, when made, may always be taken to be true as against himself. An admission is the best evidence against the partly making it. Though it is not conclusive, it shifts the onus to the maker on the principle that what a pary himself admits to be true may be reasonably presumed to be true so that until the presumption is rebutted the fact admitted must be taken to be true [*Thiru John* v. *Returning Officer*, A.I.R. (1977) S.C.1724].

Admissions may be oral or written. Admissions are receivable which are contained in letters, previous pleadings, depositions, petitions, deeds, account books, F.I.R. etc. But admissions made by conduct, like by signs or silence, are not covered under Sec. 17. They will be relevant as conduct under Sec. 8.

Sec.17 makes no distinction between an admission made by a party in a pleading and other admissions. Under the Indian Law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive and it is open to the party to show that it is not true. All the statements made in the plaint are admissible as evidence. The Court is, however, not bound to accept all the statements as correct. It may accept some of the statements and reject the rest [*Basant Singh* v. *Janky Singh*, (1967) 1 S.C.R.1]. It is immaterial to whom an admission in made. An admission made to a stranger is relevant. For an admission to have the effect of substantive evidence it must be voluntary [*Shri Krishan* v. *Kurukshetra University*, A.I.R. (1976) S.C. 376].

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The general rule is that an admission can only be given in evidence as against the party making admission and not against any other person. Secs. 18 to 20 are exceptions to this rule. Broadly stated, the rule underlying these exceptions is that the declaration of a party to the record or of one identified in interest with him are receivable in evidence against him. The identity of interest which determines the relevancy of the admission include (1) agency, (2) representative capacity, (3) proprietory or pecuniary interest, and (4) derivative interest.

Admission by party to proceeding or his agent, *etc.* (Sec. 18)

(1) *Admission by party to proceeding or his agent.* Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regard, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

(2) *Statements by suitor in representative character.* Statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

(3) *Statements by a party interested in subject-matter, and by person from whom interest derived.* Statements made by—

(a) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

(b) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Statements made by above parties are discussed below :

(1) *Party to the proceedings.* What is admitted by a party to be true must be presumed to be true unless the contrary is shown ; but before this proposition can be invoked it must be shown that there is a clear and unambiguous statement by the party such as will be conclusive unless explained [*Nagubai* v. *B. Shama Rao*, A.I.R. (1956) S.C. 593]. When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of these persons are receivable against himself and fellows whether jointly suing or not.

Agent. An admission of an agent is admissible because the principal is bound by the acts of his agent done in the course of business and within the scope of his authority.

Counsel, pleader, attorney. Admissions of fact made by a pleader in the conduct of a suit on his client's behalf are binding on the client. But a party is not bound by a pleader's admission in argument on what is a pure question of law.

Partners. They are agents of one another so far as the business of partnership is concerned. Where several persons are engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, is admissible as evidence against the others.

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(2) *Party suing or sued in a representative character.* This includes trustees, executors, administrators, managers in the character of an executor or administrator, or the assignee of a bankrupt. It is important that such persons must make the statement in, their character of persons so interested.

(3) *Person who has any proprietory or pecuniary interest.* When several persons are jointly interested in the subject-matter of a suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they are jointly suing or being sued. The admission must relate to the subject-matter in dispute and must be made by the declarant in his character of a person jointly interested [*Ambika Devi* v. *Balmukund Pandey*, A.I.R. (1981) Pat.111].

(4) *Derivative interest.* Statements made either by parties interested or by person from whom the parties have derived their interest are admissions only if they are made during the continuance of the interest of the persons making the statement.

Admissions by persons whose position must be proved as against party to suit (Sec. 19)

Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions—

(a) if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and

(b) if they are made whilst the person making them occupies such position or is subject to such liability.

Example. *A* undertakes to collect rents for *B*. *B* sues *A* for not collecting rent due from *C* to *B*. *A* denies that rent was due from *C* to *B*. *A* statement by *C* that he owed *B* rent is an admission, and is a relevant fact as against *A*, if A denies that *C* did owe rent to *B*.

The admission of a third person against his own interest when it affects his position or liability and when that position or liability has to be proved as against a party to the suit, is relevant against the party. Ordinary statements by strangers to a proceeding are not relevant as against the parties.

Admissions by persons expressly referred to by party to suit (Sec. 20)

Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Example. The question is, whether a horse sold by *A* to *B* is sound. *A* says to *B*, "Go and ask *C*, *C* knows all about it." *C*'s statement is an admission.

This Section forms another exception to the rule that admissions by stranger to a suit are not relevant. Under it the admissions of a third person are also receivable in evidence against, and have frequently been held to be in fact binding upon, the party who has expressly referred another person to him for information in regard to an uncertain or disputed matter.

Proof of admissions against persons making them, and by or on their behalf (Sec. 21)

Admissions are relevant and may be proved as against the person who makes them, or his representative in interest. But they cannot be proved by

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or on behalf of the person who makes them or by his representative in interest, except in the following cases :

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Sec. 32 (Sec. 32 deals with cases in which statement or relevant fact by a person who is dead or who cannot be found is relevant).

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendeting its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Examples. (a) The question between *A* and *B* is, whether a certain deed is or is not forged. *A* affirms that it is genuine. *B* affirms that it is forged.

A may prove a statement by *B* that the deed is genuine, and *B* may prove a statement by *A* that the deed is forged ; but *A* cannot prove a statement by himself that the deed is genuine, nor can *B* prove a statement by himself that the deed is forged.

(b) *A*, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. *A* may prove these statements, because they would be admissible between third parties, if he were dead, under Sec. 32.

(c) *A* is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Delhi on that day, and bearing the Delhi post mark of that day.

The statement in the date of the letter is admissible, because, if *A* were dead, it would be admissible under Sec. 32.

(d) *A* is acused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove the statements, though they are admissions, because tney are explanatory of conduct influenced by facts in issue.

(e) *A* is acccused of fradulently having in his possession a counterfeit coin which he knew to be counterfiet.

He offers to prove that he asked a shilful person to examine the coin as he doubted whether it was counterfeit or not, and that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in illustration *(d)*.

When oral admissions as to contents of documents are relevant (Sec. 22)

Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give

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secondary evidence of the contents of such document, or unless the genuineness of a document produced is in question.

Admission in civil cases when relevant (Sec. 23)

In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

CONFESSIONS
(Secs. 24 to 30)

Confession has been defined by Stephen as "an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime." But this definition was rejected by the Privy Council in *Pakala Narayanswamy* v. *Emperor*, (1939) P.C. 47 where it was held that "the word confession cannot be construed as meaning a statement made by an accused suggesting the inference that he committed a crime. A confession must in terms admit the offence or at any rate substantially all the facts which constitute the offence." Later the Supreme Court in *Palvinder Kaur* v. *State of Punjab*, (1953) S.C.J. 545 also followed the view expressed by the Privy Council.

A confession is a kind of admission. It is as such relevant but under certain circumstances it is declared to be irrelevant as under Sec. 24 when it is caused by inducement, threat or promise. Thus Sec. 24 enacts a rule of exclusion to the relevancy of confessions. A confession is received in evidence on the presumption that no person will voluntary make a statement which is against his interest, unless it be true. It is excluded from evidence if it is vitiated by inducement etc. because the force of a confession depends upon its voluntary character. Article 20 (3) of the Constitution also protects an accused person against testimonial compulsion.

Confession caused by inducement, threat or promise when irrelevant in criminal proceeding (Sec. 24)

Under Sec. 24 a confession made by an accused person is irrelevant in a criminal case if it is caused by *(a)* inducement, *(b)* threat, or *(c)* promise. The inducement etc., should have—

(1) reference to the charge against the accused,

(2) proceeded from a person in authority, and

(3) sufficiently given the accused person reasonable grounds for supposing that by making the confession he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Judicial and extra-judicial confessions. Confessions are divided in two classes, namely, *judicial* and *extra-judicial.* A judicial confession is that which is made to a Magistrate or in Court, in the due course of legal procedings, *e.g.*, evidence under Sec. 164 of the Code of Criminal Procedure, 1973. A confession which is made neither to a Magistrate nor in the course of legal proceedings is an extra-judicial confession. The evidence of extra-judicial confession in the very nature of things is a weak piece of evidence.

Difference between admissions and confessions. In English law the term 'admission' is used in civil cases, while the term 'confession' is used in criminal

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cases. In the Indian Evidence Act, no such distinction is maintained. From the scheme of the Sections it is seen that admissions are a *genus* of which confessions are a *species*. Thus all confessions are admissions but not *vice versa*. The term 'admission' is defined in Sec.17, but 'confession' is not defined in the Act. An admission made even to a stranger at any time even before the controversy arose is admissible. A confession to be admissible must be true and voluntary. There can be relevant admissions made by an agent or even a stranger but a confession to be relevant must be made by the accused himself. A confession of a co-accused is not strictly relevant, though it may be taken into consideration under Sec. 30 in special circumstances.

Confession made after removal of impression caused by inducement, threat, or promise, relevant (Sec. 28)

If a confession is made after the impression cause by inducement, etc. has been fully removed, it is admissible in evidence, because then it becomes free and voluntary.

Confession to police officer not to be proved (Sec. 25)

A confession made to a police officer is inadmissible in evidence, as such confession is treated as untrustworthy. The reason for the rule is to put a stop to the extortion of confession by the police by malpractices and to avoid the danger of admitting false confessions [*Paulose* v. *State of Kerala*, (1990) Cr. L.J. 108 Ker.].

Confession by accused while in custody of police not to be proved against him (Sec. 26)

Sec. 26 is an extension of the principle contained in Sec. 25. Under this Section confession made by a person whilst in custody of a police officer shall not be admissible unless it is made in the immediate presence of a magistrate. A person in custody is presumed to be under the influence of the police.

Sec. 27 is an exception and provides that if the confession made to a police officer leads to the discovery of facts, things, documents etc., that part of the information in the confession is admissible. The truth of the confession becomes guaranteed by the discovery of facts in consequence of the information given [*Parduman Singh v. State of Gujarat*, A.I.R. (1992) S.C. 881].

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc. (Sec. 29)

If a confession is shown to be otherwise relevant (under Secs. 24, 26 and 28), it does not become irrelevant merely because of the circumstances like *(a)* a promise of secrecy, *(b)* deception, *(c)* drunkenness, *(d)* interrogation, and *(e)* want of warning.

Consideration of proved confession affecting person making it and others jointly under trial for some offence (Sec. 30)

The confession of a co-accused may be taken into consideration by the Court in a case where more persons than one are being jointly tried for the same offence. The underlying principle under this exception is that "when a person admits his guilt and exposes himself to the pains and penalties provided therefor there is a guarantee for his truth." [*R.* v. *Daji Narsu*, (1882) 6 Bom.288]. Sec. 30 is an exception to the rule that the confession of one person is entirely inadmissible against another. Under

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this Section a confession by one person may be taken into consideration against another—

(1) if both of them are jointly tried ;

(2) if they are tried for the same offence ; and

(3) if the confession is legally proved.

Examples. (a) A and B are jointly tried for the murder of C. It is proved that A said "B and I murdered C". The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, "'A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

STATEMENTS

Statements by persons who cannot be called as witnesses (Secs. 32 and 33)

The general rule of law of evidence is that hearsay evidence must be kept out or disregarded. This means that as far as possible the evidence must be direct. But certain statements made by persons who are either dead or cannot be found or produced without unreasonable delay or expense, cannot be proved by direct evidence. Therefore such statements are accepted by the Court as a matter of exception to the general rule, keeping in mind the special nature of such statements and the inavailability of witnesses. Dying declarations are covered under this exception.

However the following conditions must be fulfilled:

(1) That the statement must relate to a fact in issue or relevant facts,

(2) That the statement must fall under any of the following categories : —

(i) a statement is made by a person as to the cause of his death or as to any of the circumstances resulting in his death ;

(ii) a statement made in the ordinary course of business ;

(iii) a statement which is against the pecuniary or proprietary interest of the maker ;

(iv) a statement giving the opinion as to the public right or custom or matters of general interest ;

(v) a statement made before the commencement of the controversy as to the relationship of persons, alive or dead, if the maker of the statement has special means of knowledge on the subject ;

(vi) a statement made before the commencement of the controversy as to the relationship of persons deceased, made in any will or deed relating to family affairs to which any such deceased person belonged ;

(vii) a statement in any will, deed or other document relating to any transaction by which a right or custom was created, claimed, modified, etc. ;

(viii) a statement made by a number of persons and expressing their feelings or impressions (Sec. 32) ;

(ix) evidence given in a judicial proceeding or before a person authorised by law to take it, provided that the proceeding was between the same parties

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or their representatives in interest and the adverse party in the first proceeding had the right and opportunity to cross-examine and the questions in issue were substantially the same in the first proceeding (Sec. 33).

Examples. (a) The question is, whether *A* was murdered by *B* ; or *A* dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B ; or the question is, whether *A* was killed by *B* under such circumstances that a suit would lie against *B* by *A*'s widow. Statements made by *A* as to cause of his or her death referring respectively to the murder, rape and the actionable wrong under consideration are relevant facts.

(b) The question is, as to date of *A*'s birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended *A*'s mother and delivered her of a son, is a relevant fact.

(c) The question is, whether *A*, a person who cannot be found, wrote a letter, on a certain day.

The fact that a letter written by him is dated on that day, is relevant.

(d) The question is, whether a given road is a public way.

A statement by *A*, a deceased headman of the village, that the road was public, is a relevant fact.

Statements made under special circumstances (Secs. 34 to 38)

The following statements become relevant on account of their having been made under special circumstances :

(1) Entries made in books of account regularly kept in the course of business. Such entries, though relevant, cannot alone be used to charge a person with liability (Sec. 34) ;

Example. A sues *B* for Rs. 100 and shows entries in his account books showing *B* to be indebted to him to this amount. The entieris are relevant, but are not sufficient, without other evidence, to prove the debt.

(2) Entries made in public or official records made by a public servant in the discharge of his duties, or by a person in performance of a duty specially enjoined by law (Sec. 35) ;

(3) Entires made in published maps or charts generally offered for public sale, or in maps and plans made under the authority of Government (Sec. 36) ;

(4) Statement as to facts of a public nature contained in a recital in any enactment or notification (Sec. 37) ;

(5) Statements as to foreign law books purporting to be printed or published by the Government of the foreign country, or in reports of decisions of that country (Sec. 38).

How much of statement is to be proved (Sec. 39)

Sometimes a statement sought to be produced in the Court as evidence is part of a conversation or a longer statement, or a document is part of a connected series of documents. It may be that the entire statement, conversation or series of connected documents is not relevant. In such cases, only so much of

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statements can be given in evidence as is necessary for the full understanding of the nature and effect of the statement which becomes relevant.

Things decreed in Courts like judgments of other cases (Secs. 40 to 44)

The general rule is that judgments, orders or decrees of Courts are irrelevant for the purpose of evidence. But there are certain exceptions. In the following cases judgments, decrees or orders are relevant :

1. Previous judgments are relevant to bar a second suit or trial (Sec. 40) ;

2. The judgment, order or decree made by a Court in the exercise of probate, matrimonial or insolvency jurisdiction. These are relevant to prove the existence of any such legal character or title of any such person (Sec. 41) ;

3. The judgment, order or decree relating to matters of a public nature are relevant to the inquiry but are not conclusive proof of that which they state (Sec. 42) ;

4. The judgment, order or decree which is a fact in issue or relevant fact, under some other provision of the Act (Sec. 43);

5. The judgment, order or decree produced in Court to prove that it was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion (Sec. 44).

OPINIONS OF THIRD PERSONS WHEN RELEVANT (Secs. 45 to 51)

As discussed earlier the evidence sought to be produced in Court must be direct. Therefore any opinion of a witness on a question whether of fact or law is irrelevant. However, there are some exceptions to this rule. It is not possible for the Court to have knowledge of all areas like science, medicine, foreign law, finger impressions, nor is it possible for the Court to know and trace the identity of handwriting of any person. Therefore these exceptions have been incorporated in the Act to facilitate the task of the Courts. These exceptions are :

1. Opinion of experts upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions are relevant. Experts are persons who are specially skilled and trained in such foreign law, science, art, handwriting or finger impressions (Sec. 45).

Examples. (a) The question is, whether the death of *A* was caused by poison. The opinion of experts as to the symptoms produced by the poison by which *A* is supposed to have died, are relevant.

(b) The question is, whether the given fingerprints are of *A*. The experiments carried out and the grounds on which the opinion of the finger print expert are based, are relevant.

2. Facts, otherwise not relevant, become relevant if they support or contradict opinions of experts, when such opinions are relevant (Sec. 46).

3. Opinion of any person who is acquainted with the handwriting of a person is relevant when the question is whether or not the purported document was written by that person (Sec. 47).

Example. The question is whether a given letter is in the handwriting of *A*, a merchant in London. *B* is a merchant in Calcutta, who has written letters

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addressed to *A* and received letters purported to be written by him. The opinion of *B* is relevant as he is acquainted with the handwriting of *A* although he never saw *A* write.

4. Opinions of persons who would be likely to know of the existence of any general custom or right are relevant when the existence of any general custom or right is in question (Sec. 48).

5. Opinions of persons who have special means of knowledge as to any usages, tenets, constitution and government of any religious or charitable foundation or meaning of any words or terms used in particular districts or by particular classes of people are relevant, when they are in question (Sec. 49).

6. When relationship of one person to another is in question, opinion of any person who belongs to the family of those persons or otherwise is relevant, if he has special means of knowledge on the subject (Sec. 50).

Example. The question is, whether *A* and *B* were married. The fact that they were usually treated by their friends and family as husband and wife, are relevant.

7. Whenever opinion of any living person is relevant, the grounds on which such opinion is based are also relevant (Sec. 51).

Character or reputation of parties when relevant (Secs. 52 to 55)

The general rule as to receiving evidence of witnesses is that the character or reputation of the witnesses is irrelevant. But in some cases the character or reputation of parties becomes relevant. The rules regarding consideration of character or reputation of writnesses are as follows :

1. In civil cases, the character of any person so as to render any conduct probable or improbable is irrelevant. But if there are some otherwise relevant facts which show the character of the person, then it becomes relevant (Sec. 52).

2. In criminal cases, good character of a person is relevant (Sec. 53).

3. In criminal cases, previous bad character of a person is irrelevant. But if a party alleges good character then in reply even evidence of bad character becomes relevant (Sec. 54).

4. In civil cases, if it is a case of claiming damages, character of a person so as to ascertain the amount of damages is relevant (Sec. 55).

FACTS OF WHICH EVIDENCE NEED NOT BE GIVEN (Secs. 56 to 58)

Generally speaking every fact on which a party relies must be proved, either by oral or documentary evidence. However there are three exceptions to this general rule, namely,

(a) facts judicially noticeable (Sec. 56 and 57),

(b) facts admitted (Sec. 58), and

(c) facts presumed by law (Secs. 86 to 88).

1. Facts judicially noticeable (Secs. 56 and 57)

Facts judicially noticeable need not be proved (Sec. 56). A judicially noticeable fact need not be proved by leading evidence. Judicial notice is the cognizance taken by the Court itself of certain matters which are so obvious, notorious, or clearly established that evidence of their existence is deemed

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unnecessary. Judicial notice in such cases takes the place or proof, and is of equal force.

Facts of which Court must take judicial notice (Sec. 57). Sec. 57 specifies certain matters of which the Court is bound to take judicial notice. The list of facts to be judicially noticeable as given in the Section is not exhaustive but is illustrative only. It is impossible to enumerate everything under the sun which is so notorious that it should be superflous to prove it. The tendency is to enlarge the field of judicial notice. Some of the facts enumerated in Sec. 57 are :

(1) All laws or rules in force in the territory of India (including Ordinances, orders, bye-laws, regulations, notifications, statutory licences, general customs, law reports);

(2) Acts of Parliament ;

(3) Articles of War for the Indian Army, Navy or Air Force ;

(4) The course of proceedings of the Constitutent Assembly of India, of Parliament, and of the Legislatures established under any laws for the time being in force or in the States ;

(5) All seals of Courts ;

(6) The gazetted officers ;

(7) The divisions of time, the geographical divisions of the world, public festivals, facts and holidays notified in the Official *Gazette ;*

(8) The state of war ; and

(9) The rules of the road on land or at sea.

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

2. Facts admitted need not be proved (Sec. 58)

Sec. 58 lays down the principle that what is admitted need not be proved. It runs thus :

> "No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.
>
> Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission."

Admission may be made before the suit or during the trial. Sec. 58 is different from Sec. 17 in that this Section deals with judicial admissions before the Court. It normally relates to agreed statements of facts made between both the parties to save time and expense at a trial. A Court tries issues of facts on which the parties disagree. Therefore where an allegation of fact is made by one party and it is either admitted or not denied by the other, no issue as to that fact would arise and thus evidence is dispensed with to that extent. But in case the Court

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is satisfied that the admission is fraudulent or erroneous or the admitted document is inoperative for want of registration or proper attestation, the Court may in its discretion call for evidence to prove the fact admitted.

3. Facts presumed by law (Secs. 86 to 88)

Presumption as to certified copies of foreign judicial records (Sec. 86). The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of India or of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of the Central Government in or for such country to be the manner commonly in use in that country for the certification of copies of judicial records.

An Officer who, in respect to any territory or place not forming part of India or Her Majesty's dominions, is a Political Agent therefor, as defined in Sec. 3 (43) of the General Clauses Act, 1897 shall, for the purposes of Sec. 86, be deemed to be a representative of the Central Government in and for the country comprising that territory or place.

Presumption as to books, maps and charts (Sec. 87). The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published.

Presumption as to telegraphic messages (Sec. 88). The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent. The Court shall not however make any presumption as to the person by whom such message was delivered for admission.

FACTS OF WHICH EVIDENCE CANNOT BE GIVEN

There are some facts of which evidence cannot be given though they are relevant facts. They are classified as privileged communications. In relation to evidence, privilege means a right to refuse to disclose a fact. A privilege may permit or require a witness to decline to answer a question or to produce a document at the hearing, or may permit or require a party to decline to answer an interrogatory or to disclose a document before trial. The principle of privilege from diclosure is based on public policy.

The privileges as enumerated in Secs. 121 to 129 are as follows :

(1) Privilege of Judges and Magistrates (Secs. 121).

(2) Communications during marriage (Sec.122).

(3) Affairs of State (Sec. 123).

(4) Official communications (Sec. 124).

(5) Source of information as to commission of offences from a Magistrate, a police officer or a Revenue officer (Sec. 125).

(6) Professional communications between barristers, attorneys, pleaders, vakils, interpreters, clerks and servants of barristers, attorneys etc. and legal professional advisers and their clients (Secs. 126 to 129).

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These privileges are discussed below :

Privilege of Judges and Magistrates (Secs.121). No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his in Court as such judge or Magistrate ; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Examples. (a) A, on his trial before the Court of Session, says that a deposition was improperly taken by *B*, the Magistrate. *B* cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given false evidence before *B*, a Magistrate. *B* cannot be asked what *A* said, except upon the special order of the superior Court.

(c) A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before *B*, a Session Judge. *B* may be examined as to what occurred.

Communications during marriage (Sec.122). No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married. Likewise no person shall be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents. Disclosure may however be made in suits between married persons, or in proceeding in which any married person is prosecuted for any crime committed against the other.

This Section rests on the obvious ground that the admission of testimony would have a powerful tendency to disturb the peace of families, to promote domestic broils, and to weaken, if not to destroy, that feeling of mutual confidence which is the most endearing solace of married life. The protection is not only confined to cases where the communication sought to be given in evidence is of a strictly confidential character, but the seal of law is also placed upon all communications of whatever nature which pass between husband and wife.

Evidence as to affairs of State (Sec.123). No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications (Sec.124). No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

This Section is designed to prevent the knowledge of official papers, *i.e.*, papers in official custody, beyond that circle which would obtain knowledge of them in confidence whether this confidence was express or implied. It would normally include all officers including clerks, and also non-officials to whom such papers were disclosed on the understanding that the knowledge should go no further.

Information as to commission of offences (Sec.125). No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence. Likewise no Revenue officer shall be compelled to

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say whence he got any information as to the commission of any offence against the public revenue.

"Revenue officer" in Sec. 126 means any officer employed in or about the business of any branch of the public revenue.

Professional communications (Sec.126). No barrister, attorney, pleader or vakil at any time shall be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client. Likewise he shall not be permitted to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Sec. 126 shall not however protect from disclosure—

(1) Any such communication made in furtherance of any illegal purpose.

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client. The obligation stated in Sec. 126 continues even after the employment has ceased.

Examples. (a) A, a client, says to B, an attorney, "I have committed forgery and I wish you to defend me." As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney, "I wish to obtain possession of property by the use of a forged deed on which I request you to sue." The communication, being made in furtherance of criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment. This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Section 126 to apply to interpreters, etc. (Sec.127). The provisions of Sec. 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Privilege not waived by volunteering evidence (Sec.128). If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Sec. 126. Further if any party to a suit or proceeding calls any barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose.

Confidential communications with legal advisers (Sec. 129). No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and legal professional adviser. However if he

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A. the prevention of a person from making an affirmation or denial because it is contrary to a previous affirmation or denial that he has made
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offers himself as a witness, he may be compelled to disclose any such communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

ESTOPPEL
(Secs. 115 to 117)

Estoppel (Sec. 115). When one person has by his declaration, act or omission caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Example. A intentionally and falsely leads *B* to believe that certain land belongs to *A* and thereby induces *B* to buy and pay for it. The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Estoppel is based on the maxim *allegans contraria non est audiendus* (a person alleging contradictory facts should not be heard). A person cannot be allowed to approbate and reprobate ; he cannot blow hot and cold at the same time to the detriment of another person who believing him alters his original position. It is important in these cases to note that the party raising the plea of estoppel must have actually altered his position to his detriment on the basis of a representation. If he does not believe the representation or if he does not alter his position even after believing, he cannot raise the plea of estoppel.

To invoke the doctrine of estoppel three conditions must be satisfied :

(1) a representation by a person to another,

(2) the other shall have acted upon the said representation, and

(3) such action shall have been detrimental to the interests of the person to whom the representation has been made.

Even where the first two conditions are satisfied but the third is not, there is no scope to invoke the doctrine of estoppel [*Gyarsi Bai* v. *Dhansukh Lal*, A.I.R. (1965) S.C.1055].

According to Coke, there are three kinds of estopples, namely—

(1) Estoppel by matter of record ;

(2) Estoppel by matter in writing ; and

(3) Estoppel by matter in *paiis* (esoppel by conduct) which may be—

(a) Extoppel by attestation.

(b) Extoppel by contract.

(c) Constructive extoppel.

(d) Estoppel by election.

(e) Equitable estoppel.

(f) Estoppel by negligence.

(g) Estoppel by silence.

Secs. 116 and 117 deal with estoppel of a tenant and of a licensee or a person possession (Sec.116) and estoppel of acceptor of a bill of exchange, bailee or licensee (Sec. 117).

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Estoppel of tenant and of licensee of person in possession (Sec.116). No tenant of immovable property, or person claiming through such tenant, shall be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. This estoppel shall apply throughout during the continuance of the tenancy. Likewise no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

Estoppel of acceptor of bill of exchange, bailee or licensee (Sec.117). No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such a bill or to endorse it. Likewise no bailee or licensee shall be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such licence. If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

ORAL, DOCUMENTARY AND CIRCUMSTANTIAL EVIDENCE

Oral evidence (Secs. 59 and 60)

Secs. 59 and 60 enact two broad rules with regard to oral evidence :

First, that all facts except the contents of documents may be proved by oral evidence; (Sec. 59) and

Secondly, that oral evidence must in all cases be direct and not hearsay (Sec. 60).

Oral evidence means statements which the Court permits or requires to be made before it, by witnesses in relation to matters of fact under inquiry (Sec. 3). 'Oral' means by word of mouth ; but a witness who is unable to speak may give evidence in any manner in which he can make it intelligible, *e.g.*, by writing or by signs (Sec. 119).

Oral evidence must be direct (Sec. 60). Oral evidence must, in all cases whatever, be direct ; that is to say—

(1) If it refers to a *fact* which could be *seen*, it must be the evidence of a witness who says he saw it ;

(2) If it refers to a *fact*, which could be *heard*, it must be evidence of a witness who says he heard it ;

(3) It it refers to a *fact* which could be *perceived* by any other sense or in any other manner, it must be evidence of a witness who says he perceived it by that sense or in that manner ;

(4) If it refers to an *opinion* or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

(5) If oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Documentary evidence (Secs. 61 to 73)

Sec. 61 to 73 deal with documentary evidence as a mode of proof. Sec. 61 lays down that the contents of a document may be proved by either the primary or the secondary evidence. Document means any

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matter expressed or described upon any substance (by means of letters, figures or marks or by more than one of these means) intended to be used or which may be used for the purpose of recording that matter (Sec. 3). Documents produced for the inspection of the Court are called documentary evidence.

The law of evidence requires that the best evidence must be given. Hence primary evidence, *i.e.*, the original documents, must be produced in the Court. In the absence of primary evidence, secondary evidence (copies of original documents) may be produced. Secondary evidence is not admissible until the non-production of primary evidence is satisfactorily accounted for (Sec. 64). Sec. 65 lays down the cases where secondary evidence may be given of the existence, condition, or contents of a document.

Secs. 61 to 73 are discussed below :

Proof of contents of documents (Sec. 61). The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence (Sec. 62). Primary evidence means the document itself produced for the inspection of the Court.

Where a document is executed in several parts, each part is primary evidence of the document. Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against parties executing it. Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the original.

Example. A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Secondary evidence (Sec. 63). Secondary evidence means and includes—

(1) certified copies given under the provisions of the Act ;

(2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies ;

(3) copies made from or compared with the original ;

(4) counterparts of documents as against the parties who did not execute them ;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Examples. (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence ; but the copy not so compared is not necessary evidence of

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the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine-copy of the orginal, is secondary evidence of the original.

Proof of documents by primary evidence (Sec. 64). Documents must be proved by primary evidence except in the cases specifically mentioned in the Act.

Cases in which secondary evidence relating to documents may be given (Sec. 65). Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :

(a) when the original is shown or appears to be in the possession or power— (i) of the person against whom the document is sought to be proved, or (ii) of any person out of reach of, or not subject to, the process of the Court, or (iii) of any person legally bound to produce it, and when, after the notice mentioned in Sec. 66, such person does not produce it ;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily movable ·

(e) when the original is a public document within the meaning of Sec. 74 ;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In case *(a)*, *(c)*, and *(d)*, any secondary evidence of the contents of the document is admissible.

In case *(b)*, the written admission is admissible.

In case *(e)* or *(f)*, a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case *(g)*, evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents.

Rules as to notice to produce (Sec .66). Secondary evidence of the contents of the documents referred to in Sec. 65 *(a)* shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law. If no notice is prescribed by law, then the notice to be given is such as the Court considers reasonable under the circumstances of the case. However, such notice shall not be required to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it :

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(1) when the document to be proved is itself a notice ;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) when the adverse party or his agent has the original in the Court ;

(5) when the adverse party or his agent has admitted the loss of document ;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Proof of signature and handwriting of person alleged to have signed or written document produced (Sec. 67). If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Proof of execution of document required by law to be attested (Sec. 68). If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. It shall however be not necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specially denied.

Proof where no attesting witness found (Sec. 69). If no attesting witness can be found (*e.g.*, where he is dead or has become insane), it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person.

Admission of execution by party to attested document (Sec. 70). The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Proof when attesting witness denies the execution (Sec. 71). If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested (Sec. 72). An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of signature, writing or seal with others admitted or proved (Sec. 73). In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

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Sec. 73 applies also, with any necessary modifications, to finger impressions.

Exclusion of oral evidence by documentary evidence (Secs. 91 to 100)

Evidence of terms of contracts, grants and other dispositions of property reduced to form of document (Sec. 91). Sec. 91 is based on the 'best evidence rule'. It provides that when the terms and conditions of a contract, grant or any other disposition of property have been reduced to writing by agreement of parties, and in the case of all documents which the law requires to be reduced to writing, the document is intended to be a record of the transaction. In such a case, no other evidence shall be given to prove the transaction, except the document itself or secondary evidence thereof in cases in which secondary evidence is admissible.

Exclusion of evidence of oral agreement (Sec. 92). When the terms and conditions of a transaction are reduced to writing either by agreement of parties or as required by law, no oral evidence is admissible to modify a document so as to contradict, vary, add to or subtract from its terms, except in exceptional cases mentioned in the Section itself.

Examples. (a) A policy of insurance is effected on goods "in ships from Calcutta to London". The goods are shipped in a particular ship which is lost. The fact that the particular ship was orally excepted from the policy cannot be proved.

(b) A agrees absolutely in writing to pay *B* Rs.1,000 on 1st March, 1994. The fact that, at the same time an oral agreement was made the money should not be paid till 31st March cannot be proved.

Exclusion of evidence to explain or amend ambiguous document (Sec. 93). When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Examples. (a) A agrees, in writing, to sell a horse to *B* for "Rs.10,000 or Rs.15,000". Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Sec. 93 deals with patent ambiguities in a deed. If the language of the deed is on its face, ambiguous or defective, no extrinsic evidence can be given to make it certain. The main principle on which the rule is founded is that the intention of parties should be construed, not by vague evidence of their intentions, independently of the expression which they have thought fit to use but by the expressions themselves. It is not open to the Court or the parties to remove vagueness by relying on extrinsic evidence because it means making of new contract between the parties [*Keshavlal Lallubhai Patel* v. *Lalbhai*, A.I.R. (1958) S.C. 512].

Exclusion of evidence against application of document to existing facts (Sec. 94). When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Example. A sells to *B* by deed, "my estate at Rampur containing 2 hectares". *A* has an estate at Rampur containing 2 hectares. Evidence may not be given of the

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fact that the estate meant to be sold was one situated at a different place and of a different size.

Thus according to Sec.94 the words used in a document are to be construed according to their plain common meaning and therefore no extrinsic evidence is admissible.

Ambiguities in documents—*extrinsic evidence admissible.* Secs. 95 to 97 deal with latent ambiguities in a document when the words of a document are clear but their application to the circumstances is doubtful. In such cases, extrinsic evidence may be used for removing the ambiguity [*Umesh Chandra* v. *Sageman*, 5 Beng. L.R. 633].

Evidence as to document unmeaning in reference to existing facts (Sec. 95). When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a particular sense.

Example. A sells to *B*, by deed, "my house in Calcutta". *A* had no house in Calcutta, but appears that he had a house in Howrah, of which *B* had been in possession since the execution of the deed. These facts may be proved to show that the deed related to the house at Howrah.

Evidence as to application of languages which can apply to one only of several persons (Sec. 96). When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Examples. (a) A agrees to sell to *B*, for Rs. 10,000, "my white horse". *A* has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany *B* to Rampur. Evidence may be given of facts showing whether Rampur in Uttar Pradesh or Rampur in Himachal Pradesh was meant.

Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies (Sec. 97). When the language used applies partly to one set of existing facts, and partly to another set of exisiting facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Example. A agrees to sell to *B* "my land at *X* in the occupation of *Y*". *A* has land at *X*, but not in the occupation of *Y*, and he has land in the occupation of *Y* but it is not at *X*. Evidence may be given of facts showing which land he meant to sell.

Evidence as to meaning of illegible characters, etc (Sec. 98). Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of words used in a peculiar sense.

Example. A, a sculptor, agrees to sell to *B*, "all my mods'. *A* has both models and modeling tools. Evidence may be given to show which he meant to sell.

Who may give evidence of agreement varying terms of document (Sec. 99). Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Example. A and *B* made a contract in writing that *B* shall sell *A* certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three

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months' credit shall be given to *A*. This could not be shown as between *A* and *B*, but it might be shown by *C*, if it affected his interests.

Saving of provisions of Indian Succession Act relating to wills (Sec.100). Nothing in Secs. 91 to 100 contained shall be taken to affect any of the provisions of the Indian Succession Act, 1865 as to the construction of wills.

BURDEN OF PROOF

Burden of proof is the obligation to adduce evidence to the satisfaction of the Court in order to establish the existence or non-existence of a fact contended by a party. The rule is "he who asserts must prove". The provisions as to burden of proof are founded on the rule *ei incumbit probatio qui dicit, non qui negat*—the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it ; for a negative is usually incapable of proof. The party on whom the onus of proof lies must, in order to succeed, establish a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. He must succeed by the strength of his own right and the clearness of his own proof. He cannot be heard to say that it was too difficult or virtually impossible to prove the matter in question [*Shiv Charan Singh* v. *Chandra Bhan*, A.I.R. (1988) S.C.637].

Secs. 101 to 106 lay down the general rules regulating the burden of proof.

Circumstantial evidence. Circumstantial evidence, also known as presumptive evidence, means evidence by way of circumstances in contradistinction to direct evidence. It does not prove the point in question directly, but establishes it only by inference or deductive reasoning.

Four things are essential to prove guilt by circumstantial evidence :

(1) That the circumstances from which guilt is established must be fully proved ;

(2) That all the facts must be consistent with the hypothesis of guilt of the accused ;

(3) That the circumstances must be of a conclusive nature and tendency ;

(4) That the circumstances should, to a moral certainty, actually exclude every hypothesis except the one proposed to be proved [*Bhagat* v. *State*, A.I.R. (1954) S.C. 621].

In other words circumstantial evidence must be both exclusive and conclusive, *i.e.*, it must exclude the hypothesis of innocence of the accused and must conclusively establish his guilt [*Gambhir* v. *State of Maharashtra*, A.I.R. (1982) S.C. 1157].

TEST QUESTIONS

1. What is the object of study of Law of Evidence.
2. Discuss the provisions relating to motive, preparation and conduct under the Indian Evidence Act, 1872.
3. Discuss the provisions of the Indian Evidence Act, 1872 relating to relevant facts.
4. What are the facts of which evidence need not be given and of which evidence cannot be given ?
5. Distinguish between admission and confession.

(C.S.E. December, 1992, 1989, 1988 ; June 1987)

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6. Distinguish between relevant facts and facts in issue. *(C.S.E. June 1989)*

7. "In Courts we are concerned with legal relevancy and not logical relevancy of facts." Elaborate. *(C.S.E. December 1986)*

8. Define the term *Res gestae* and discuss the provisions relating to it.

9. "A witness though compellable to give evidence is in respect of a particular matter within the limit of which he is not bound to answer questions while giving evidence." Explain. *(C.S.E. December 1989)*

10. *(a)* What is oral and documentary evidence and discuss the provisions relating to exclusion of oral evidence by documentary evidence.

(b) "Hearsay evidence is no evidence." Explain this rule of law. Is hearsay evidence ever admissible ? *(C.S.E. June 1993)*

11. Discuss the principle of estoppel and kinds of estoppel.

12. Write short notes on.

(a) Circumstantial evidence.

(b) Burden of proof.

(c) Presumptions.

(d) Facts in issue and relevant facts.

(e) Doctrine of estoppel. *(C.S.E. December 1989)*

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *A* agrees to sell to *B* "my land at *X* in the occupation of *Y*". *A* has a land at *X*, but not in occupation of *Y* and he has some other land in the occupation of *Y*, but not at *X*. How will the Court decide which land was meant to be transferred ? *(C.S.E. December 1986)*

[Hint : Evidence may be given of facts showing which land *A* had meant to sell. Sec. 97].

2. Vijay admits execution of some document but denies contents thereof. How would the Court decide the matter ? *(C.S.E. December 1986)*

[Hint: The Court will decide on the basis of the document unless Vijay proves by facts alteration without his consent].

3. *A* is accused of a crime committed by him at Calcutta. *A* produces a letter written by himself and dated at Singapore on that day and bearing the Singapore post mark of that day. Is it admissible in evidence in the Court. *(C.S.E. June 1990)*

[Hint : Yes Sec. 21].

4. A murder is committed on a dark right. Nobody is named as the murderer. The sub-inspector of police goes to the locality to investigate. While he is investigating one *B* comes to him and says that it was he who committed the murder. After that *B* is arrested and becomes accused in the case and is tried of the offence of murder. Is such a confession of *B* admissible ? *(C.S.E. December 1990, June 1988)*

[Hint : No. Sec. 25. *State of U.P.* v. *Deoman Upadhyaya*, A.I.R. (1960) S.C. 1125].

5. *A* is charged with the murder of *B*. He is arrested and taken into custody of the sub-inspector of police incharge of investigation. *A* stated before the said sub-inspector of police, "I killed *B* and threw his body in a well." The said sub-inspector goes to well with some independent witnesses and takes out the body of *B* at the instance of *A*. Can *A*'s statement be proved against him ? *(C.S.E. June 1991)*

[Hint: Yes : Sec. 27].

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6. *A* and *B* were married in 1982. They lived as husband and wife upto January 10, 1992 when their marriage was dissolved by a decree of divorce passed by a Court of competent jurisdiction. In 1990, *A* told *B* that he had committed theft of ornaments of *C*. In 1993, trial commences against *A* for the theft of ornaments of *C*. Can *B* appear as a witness against *A* and state before the Court that *A* had intimated to her in 1990 that he committed theft of ornaments of C ? *(C.S.E. June 1992)*

[Hint : No. Sec. 122].

7. The charge against *B* is that she, with the help of her paramour, M has committed murder of her husband by administring poison to him. *B* makes a confession. In its first part she states that bottles containing poison and medicine for her ailing husband were lying in the same almirah, and that she by mistake administered poison in place of medicine to her husband. In the other part she narrates how she and *M* threw the dead body in a well to destroy evidence. Can the Court reject the first part as not true and accept other treating it correct ? *(C.S.E. December 1992)*

[Hint : No. The Court may accept the confession *in toto* or reject it *in toto*. It cannot partly accept and partly reject the confession (*Palvinder Kaur* v. *The State of Punjab*, A.I.R. (1952) S.C. 354)].

8. At the trial of A for the murder of *C* the prosecution put as evidence the statement of *A* : "I will produce the two knives concealed in a room of *B*'s house with which *B* and I stabbed *C*." This statement had been made by *A* while he was in the custody of a police officer and did lead to the discovery of the knives. Discuss with reference to the law of evidence whether the statement of *A* is admissible ? *(C.S.E. June 1993)*

[Hint : Yes. Sec. 27].

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8

The Specific Relief Act, 1963

SPECIFIC RELIEF

'Specific relief' means relief *in specie* which aims at the exact fulfilment of an obligation. This is also known as 'equitable relief'. For example, in case of breach of a contract, damages, *i.e.*, monetary compensation, to the aggrieved party may not be an adequate remedy. In such a case, the Court may order for the specific performance of the contract. Specific performance of the contract granted by the Court to the aggrieved party is the specific relief which he may seek from the Court and to which he is entitled.

Examples. (a) A agrees to sell a piece of land to *B*. *B* pays the agreed price, but *A* refuses to execute the deed of transfer. *B* has the right to have the contract carried into effect by asking the competent Court to compel *A* to perform the contract. That will be a relief *in specie*, asking the Court to have the very act performed by *A* which he had agreed to do.

(b) In the course of *A*'s employment as a pleader, certain papers belonging to his client, *B*, come into his possession. *A* threatens to make these papers public. B may sue for injunction to restrain *A* from so doing, as no amount of damages can possibly make amends to the wrong done to *B* if these papers are made public.

It is the duty of the State to see that no one encroaches upon the rights of another. If someone does, the law should grant to the aggrieved party which approaches it for relief, the very thing (or one as nearly equivalent to it as possible) which he is being, or has been, deprived of.

Examples. (a) A is *B*'s medical adviser. He demands money of *B* which *B* declines to pay. *A* then threatens to make known *B*'s communications to him as a patient showing that *B* has led immoral life. *A* may be restrained from doing so.

(b) A, without any right, digs sand from *B*'s land. *B* may be restrained from continuing to do so.

One who seeks equity shall do equity. Specific performance is an equitable relief and he who seeks equity must do equity to the opposite party. The final end of law is justice and so the means to it should be informed by equity [*K.Kalpana Saraswathi* v. *P.S.S. Somasundaram Chettiar*, A.I.R. (1980) S.C. 521].

THE SPECIFIC RELIEF ACT 1963

The law on specific relief in India is contained in the Specific Relief Act, 1963. The underlying principles of the reliefs provided for in the Act are those which were developed and applied by the Courts of Equity in England.

The Act came into force on 1st March, 1964. It extends to the whole of India except the State of Jammu and Kashmir [Sec. 1 (2)].

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Reference to Sections

The references to Sections in this Chapter, unless otherwise indicated, are to the Specific Relief Act, 1963.

Principles upon which specific relief is granted

The general principles upon which the remedy of specific relief is granted are as follows :

1. *Damages not an adequate remedy.* Where damages in money are not an adequate remedy or relief, the Court grants on equitable grounds the remedy of specific relief or performance.

2. *Discretion of the Court.* The Court does not grant specific performance where compensation in money is an adequate relief. But the mere fact that damages are not an adequate relief is not in itself sufficient to entitle the aggrieved party to claim specific performance. The power of the Court to grant specific performance is discretionary. But this discretion of the Court is not capricious or arbitrary, depending upon the will or pleasure of the Court. It has to be exercised on sound and established principles of equity. The principles which guide the Courts in granting specific relief are :

(a) He who comes to equity must come with clean hands.

(b) He who seeks equity shall do equity. In *Knight* v. *Simmonds*, (1896) 2 Ch. 294, Lindley L.J. observed in this regard : "When equitable relief is sought, equitable defences may have to be considered."

(c) Delay defeats equity.

3. *Specific relief granted only for enforcing individual civil rights and not for enforcing penal laws* (Sec. 4). Specific relief can be granted only for the purpose of enforcing individual civil rights and not for the purpose of enforcing a penal law. But where enforcement of a penal law is merely incidental to the grant of specific relief, the Court will not necessarily refuse it if the relief claimed is with regard to the civil right affecting the person or property of the plaintiff.

Example. A threatens to publish a libel (which is a crime under the Indian Penal Code, 1860) against *B*. *B* may seek injunction against the publication of the libel which the Court may grant.

Definitions in the Specific Relief Act and the Indian Contract Act

The Specific Relief Act, 1963 defines the following four terms only, viz., *(a)* obligation, *(b)* settlement, *(c)* trust and *(d)* trustee. These terms have been defined at appropriate places in the discussion that follows.

Other words and expressions used (but not defined) in the Specific Relief Act, 1963. If these terms are defined in the Indian Contract Act, 1872, they shall have the meaning as assigned to them in this Act.

Savings (Sec. 3)

Except as otherwise provided in the Specific Relief Act, 1963, nothing in this Act shall be deemed—

(a) to deprive any person of any right to relief, other than specific performance, which he may have under any contract ; or

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(b) to affect the operation of the Indian Registration Act, 1908, on documents.

This means the Specific Relief Act, 1963 provides relief in addition to the relief provided under the Indian Contract Act, 1972. Further, the provisions of the Indian Registration Act, 1908 are not affected by the provisions of the Specific Relief Act, 1963.

KINDS OF SPECIFIC RELIEF

The various kinds of specific relief discussed in the Act are shown in the following chart :

SPECIFIC RELIEF

Specific performance	Injunction	Declaratory decres	Rectification of instruments	Rescission of contracts	Cancellation of instruments
(1) Recovery of posession of property (Secs. 5 to 8) (2) Specific performance of contracts (Secs. 9 to 25)	(1) Injunction gene rally (Secs. 36 and 37) (2) Perpetual injunctions (Secs. 38 to 42)	(Secs. 34 and 35)	(Sec. 26)	(Secs. 27 to 30)	(Secs.31 33)

SPECIFIC RELIEF

(Secs. 5 to 8)

A person may acquire a property by inheritance or transfer through sale or gift. He may also be in possession of some property for a certain period as in case of mortgage or pledge. If he is deprived of his property or of any right or interest therein, he is entitled to get the very property of which he is being deprived or to have his right restored. The Specific Relief Act, 1963 lays down the law in this regard under two heads, *viz.*,

1. Recovery of immovable property, and
2. Recovery of movable property.

1. Recovery of immovable property

The Specific Relief Act, 1963 provides for the recovery of the possession of immovable property on the strength of—

(a) title, and

(b) possession

(a) Recovery on the strength of title (Sec. 5) A person entitled to the possession of specific immovable property may recover it in the manner provided by the Code of Civil Procedure, 1908. According to this Code, he may file a suit for ejectment on the strength of his title to the property within 12 years of the date of dispossession. The term 'title' here means title based on mere possession.

(b) Recovery on the strength of possession (Sec. 6). A person may sometimes be dispossessed without his consent of immovable property otherwise than in due course of law. Such a person or any person claiming through him

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may, by suit, recover possession of such property, notwithstanding any other title that may be set up in such suit.

Sec. 6 affords a summary procedure for the restoration of *status quo ante* without reference to any question of title. Possession is sufficient evidence of right as against the trespasser

The requisites for relief under Sec. 6 are as follows :

(1) The possession of the plaintiff was actual and not constructive. The plaintiff must also establish that the possession was legal possession and not merely actual possession. It is enough that the plaintiff had the possession as a fact. It makes no difference even if he has no right to the property.

Example. A tenant continued to be in possession of property even after the expiry of his tenancy. He was forcibly dispossessed by the landlord. *Held*, the tenant was entitled to sue his landlored under Sec. 6 and recover possession (*Rudrappa* v. *Narsingrao*, (1905) 29 Bom. 213).

(2) The plaintiff was dispossessed without his consent and otherwise than in due course of law.

Example. A is in possession of property *X*. Thinking that *B* is the rightful owner, he hands over the property to *B*. He cannot sue for possession under Sec. 6 as he is not dispossessed without his consent.

(3) The suit under Sec. 6 must be brought within a period of 6 months from the date of dispossession.

The following points should also be noted with regard to the scope of relief under Sec. 6:

(1) However good the title of the dispossessor may be, the person previously in possession of the immovable property is entitled to the possession. The object of Sec. 6 is to discourage forcible dispossession.

(2) The restoration of possession is without prejudice to the ultimate rights of the parties which must be determined in a Court of Law. The Court does not decide any question of title under Sec. 6.

(3) Any order made by the Court under Sec. 6 does not prejudice or improve the title or claim of either party.

(4) No suit under Sec. 6 can be brought against the Government.

(5) No appeal lies from any order or decree passed in any suit instituted under Sec. 6 nor is any review of any such order or decree allowed.

(6) Sec. 6 does not bar any person from suing to establish his title to such property and to recover possession thereof. The remedy provided by Sec. 6 is an additional remedy. It does not preclude the party dispossessed to assert his claim or title in the ordinary Court of Law in which case the limitation of 6 months does not apply.

2. Recovery of movable property (Sec.7)

A person entitled to the possession of *specific movable property* may recover it in the manner provided by the Code of Civil Procedure, 1908. Sec 7 provides for the recovery of movable property *in specie*, *i.e.*, the thing itself and not its substitute or money equivalent. Further, the movable property or thing to be recovered must be specific *i.e.*, capable of being ascertained and

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identified. Sec 7 has no application in case of recovery of money as money has no particular earmark.

Right to immediate possession. The plaintiff must have a right to the immediate possession of the movable property. He need not be the absolute owner of the property. He may be a limited owner and may have a temporary or special right independently of the ownership by virtue of being a bailee, pawnee or trustee. If he has the right to the immediate possession of the movable property, he is entitled to recover it under Sec. 7.

Trustee. A trustee may sue for the possession of movable property of which he is the trustee. The term 'trustee' includes every person holding property in trust. 'Trust' has the same meaning as in Sec. 3 of the Indian Trusts Act, 1882 and includes an obligation in the nature of a trust.

Special right. A special or temporary right to the present possession of movable property is sufficient to support a suit under Sec.

Examples. (a) A bequenths land to *B* for his life, with remainder to *C*. *A* dies. *B* enters on the land, but *C*, without *B's* consent obtains possession of title deeds. *B* may recover them from *C*

(b) A pledges certain jewels to *B* to secure a loan. *B* disposes them of before he is entitled to do so, *A*, without having paid or tendered the amount of the loan, sues *B* for the possession of the jewels. The suit should be dismissed, as *A* is not entitled to their possession, whatever right he may have to secure their safe custody.

(c) A receives a letter addressed to him by *B*. *B* gets back the letter without *A's* consent. *A* has such property therin as entitles him to recover it from *B*.

(d) A deposits books and papers for safe custody with *B*. *B* loses them, and *C* finds them, but *C* refuses to deliver them when demanded. *B* may recover them from *C* subject to *C's* right (if any) under Sec. 168 (which deals with the right of finder of lost goods to sue for specific reward) of the Indian Contract Act, 1872.

(e) A, a warehouse keeper, is charged with the delivery of certain goods to *Z*, which *B* takes out of *A's* possession. *A* may sue *B* for the goods.

Liability of the person in possession not as owner (Sec. 8)

Sometimes, a person may have the possession or control of a particular article of movable property, of which he is not the owner. In certain cases as enumerated in Sec. 8, he may be compelled specifically to deliver the property to the person entitled to its immediate possession. The cause of action under Sec. 8 arises from the right to immediate possession. In order that this Section may be applicable, the following conditions must be fulfilled :

(1) The defendant has the possession or control of the particular article claimed.

(2) The article is movable property.

(3) The defendant is not the owner of the article so claimed.

(4) The plaintiff is entitled to the immediate possession of the article.

The plaintiff (the person entitled to the immediate possession of specific movable property) can recover it in any of the following cases :

(1) When the thing claimed is held by the defendant as the agent or trustee of the plaintiff.

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Example. *A* proceeding to Europe, leaves his furniture in charge of *B* as his agent during his absence. *B*, without *A*'s authority, pledges the furniture to *C*, and *C* knowing that *B* had no right to pledge the furniture, advertises it for sale. *C* may be compelled to deliver the furniture to *A* for he holds it as A's trustee.

(2) When compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed.

Example. *Z* has got possession of an idol belonging to *A*'s family, and of which *A* is the proper custodian. *Z* may be compelled to deliver the idol to *A*.

The thing may have acquired, by reason of personal, family or any peculiar association, a value which eludes estimation in terms of money, *e.g.*, trophies won in war, private letters, etc.

(3) When it would be extremely difficult to ascertain the actual damage caused by the loss of the article.

Example. *A* is entitled to a picture by a dead painter and of rare China vases. *B* has possession of them. The articles are of too special a character to bear an ascertainable market value. *B* may be compelled to deliver them to *A*.

The thing claimed in the above case is a rarity and its value is inestimable in the sense that different people will put different values on the thing. The value here will depend on the aesthetic sense and artistic taste of the valuer.

Unless and until the contrary is proved, the Court shall, in respect of any article of movable property claimed under Clause (2) or Clause (3) discussed above, presume—

(a) the compensation in money would not afford the plaintiff adequate relief for the loss of the thing claimed, or as the case may be,

(b) that it would be extremely difficult to ascertain the actual damage caused by its loss.

(4) When the possession of the thing claimed has been wrongfully transferred from the plaintiff.

Differences between Secs. 7 and 8

1. The relief under Sec. 7 is general. It is independent of the property or the relationship between the parties. The relief under Sec. 8 is special. It depends upon the nature of the property or the relationship between the parties.

2. A person having temporary or special right to the possession of specific movable property may sue even the owner of the property under Sec. 7. Such a suit is incompetent against the owner under Sec. 8.

3. The relief claimed under Sec. 7 is for recovery of the special movable property or, in the altemative, for compensation. The relief claimed and given under Sec. 8 is for the delivery of the specific movable property. Monetary compensation under Sec. 8 is not an adequate relief.

SPECIFIC PERFORMANCE OF CONTRACTS
(Secs. 9 to 25)

Specific performance is an equitable relief given by the Court in cases of breach of a contract. It is in the form of a judgment by the Court ordering the defendant to actually perform the contract according to its terms and

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stipulations. The stipulations in the contract may be positive, *i.e.*, to do a certain thing, or negative, *i.e.*, not to do a certain thing as not to build a wall. The term 'specific performance' is generally confined to the positive stipulations, *i.e.*, fulfilment of positive obligations. The term 'injunction' is used for the relief claimed in respect of negative stipulations.

The Common Law redress in case of a breach of a contract was award of damages to compensate the aggrieved party. The Equity however deemed such a course in certain cases as wholly inadequate for the purposes of justice. The Courts of Equity therefore interposed and bound the defendant for the specific performance of the act which he had contracted to perform.

Defences (Sec. 9)

The fundamental ruie of law is that equity will grant specific performance in case of only such contracts which are valid at law. Where any relief is claimed in respect of a contract, the person against whom the relief is claimed may plead by way of defence any ground, *e.g.*, absence of consideration or incompetence to contract, which is available to him under any law relating to contracts. It is on this ground that specific performance of a contract entered into by a minor is not granted even where the minor had misrepresented his age [*Ajudhia Prasad* v. *Chandan Lal*, A.I.R. (1937) All. 610].

The subject of specific performance may be discussed under the following heads :

1. Contracts which may be specifically enforced.
2. Contracts which cannot be specifically enforced.
3. Defences to an action for specific performance.
4. Parties to an action for specific performance.

CONTRACTS WHICH MAY BE SPECIFICALLY ENFORCED (SEC. 10)

Execpt as otherwise provided in the Act, the specific performance of any contract may, in the discretion of the Court, be enforced in the following cases :

(1) Lack of standard for ascertaining the damage. When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done, the specific performance may, in the discretion of the Court, be enforced.

Examples. (a) A agrees to buy, and *B* agrees to sell, a picture by a dead painter and 2 rare China vases. *A* may comple *B* specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

(b) A agrees to sell, and *B* agrees to buy, a house in which *B* was born. *B* may compel *A* specifically to perform this contract.

(2) *Compensation in money not adequate relief.* When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief, the specific performance of a contract may, in the discretion of the Court, be enforced.

Examples. (a) A contracts with *B* to sell him a house for Rs. 1,00,000. *B* is entitled to a decree directing *A* to convey the house to him, he paying the purchase-money.

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(b) A contracts to sell, and *B* contracts to buy, a certain number of railway shares of a particular description. *A* refuses to complete the sale. *B* may compel *A* specifically to perform this agreement, for the shares are limited in number, and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

(c) A contracts with *B* to paint a picture for *B*, who agrees to pay therefor Rs. 1,000. The picture is painted. *B* is entitled to have it delivered to him on payment or tender of Rs. 1,000.

Sec. 10 makes it abundantly clear that the enforcement of specific performance of a contract is in the discretion of the Court. It is not incumbent upon the Court to decree specific performance merely because a case falls within the provisions of Sec. 10. Further no person can claim specific performance as a matter or right.

Presumptions. Unless and until the contrary is proved, the Court shall make the following presumptions :

(i) In case there is a breach of a contract to transfer immovable property, it cannot be adequately relieved by a compensation in money.

(ii) In case there is a breach of a contract to transfer movable property, it may be adequately relieved by compensation in money except in the following cases :

(a) Where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market ;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.

Specific performance may also be enforced in the in the following two cases :

Substantial acts done by plaintiff (Sec. 20). Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance, the Court may properly exercise discretion to decree specific performance.

Exceptions under Sec. 14. Sec. 14 deals with contracts which cannot be specifically enforced. It also provides certain exceptions (discussed later in this Chapter). In these cases the Court may enforce specific performance.

Doctrine of mutuality. Mutuality is essential in suits for specific performance, *i.e.*, a person can sue for specific performance only if he could also be compelled to specifically perform his part of the obligation. Mutuality does not mean equality. It only means that each party to the contract is entitled to the equitable remedy of specific performance against the other contracting party. Thus an agreement entered into by a minor cannot be specifically enforced by or against a minor. Likewise, a contract for personal service cannot be specifically enforced.

The different High Courts in India had in past held different views as to applicability of the doctrine of mutuality. Sec. 20 (4) now clears the fog and specifically provides that the Court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party.

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Specific performance of contracts connected with trusts (Sec. 11)

Except as otherwise provided in the Act, specific performance of a contract may, in the discretion of the Court be enforced when the act agreed to be done is the performance wholly or partly of a trust.

Example. *P* agreed not to compete with *D* in the purchase of a certain property on the condition that *D* would convey part of such property to *P*. After having purchased the property, *D* refused to convey. *Held*, *D* was bound as he was a trustee for *P* for the portion of the property which was to be conveyed.

A contract made by a trustee in excess of powers or in breach of trust cannot be specifically enforced.

Specific performance of part of contract (Sec. 12)

The general rule is that the Court normally does not grant specific performance of only a part of a contract. In other words the Court grants specific performance of a contract in the its entirety. *i.e.*, in accordance with the actual or exact terms of the contract. This, in effect, means that the Court should abstain from remodelling contracts.

Sec. 12, however, provides that the Court may direct the specific performance of a part of a contract in the following cases :

(1) *Part left unperformed proportionately small.* Sometimes a party to a contract is unable to perform the whole of his part of the contract. If the part which is left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the Court may at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Example. *A* contracts to sell to *B* a piece of land consisting of 100 bighas for Rs. 1,00,000. It turns out that out of the 100 bighas 2 bighas belong to a stranger, who refuses to part with them. The 2 bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important that the loss of them may not be made good in money. *A* may be directed at the suit of *B* to convey to *B* the 98 bighas and to compensate him for the loss of 2 bighas, or *B* may be directed at the suit of *A* to pay to *A*, on receiving the conveyance and possession of the land, the stipulated purchase money, less a sum awarded as compensation for the deficiency.

If the 2 bighas of land not conveyed are substantial, *i.e.*, they cut off the remaining 98 bighas of land from the approach road, the specific performance of the contract cannot be decreed.

(2) *Part left unperformed considerably large.* Sometimes, the part of a contract which is left unperformed may be considerably large. If the part of a contract which is left unperformed forms a considerable portion of the whole or does not admit of compensation in money, the plaintiff is not entitled to a decree for specific performance. But if the plaintiff relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him, he can sue for and the Court may grant specific performance.

Example. *A* contracts to sell *B* a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to *A* and the other 50 bighas to *C*, a stranger, who refused to part with them. *A* cannot obtain a decree against B for the specific performance of the contract but if *B* is willing to pay the price agreed upon, and to

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take the 50 bighas which belong to *A*, waiving all rights to compensation either for the deficiency of for loss sustained by him through *A*'s neglect or default, *B* is entitled to a decree directing *A* to convey those 50 bhighas to him on payment of the purchase-money.

(3) *Separate and independent part.* Sometimes a contract consists of several parts which stand on separate and independent footings, and some of which can and sosme of which cannot be specifically enforced. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of that independent and separate part which can be specifically enforced. Whether a contract is divisible or not depends upon the particular circumstances of each case, the terms of the contract and the nature of the property. It is outside the province of a Court to separate parts of a contract and enforce them piecemeal. Lord Romilly observed in *Merchant Trading Co.* v. *Bomer*, I.L.R. 12 Eq. 32 in this regard as follows : "As a general rule, the Courts cannot specifically enforce the contract in piecemeal but it must be performed in entirety if performed at all—exception being in case where the contract is divisible, parts of which are in themselves distinct wholes."

A party to a contract shall be deemed to be unable to perform the whole of his part of it if a portion of its subject-matter existing at the date of the contract has ceased to exist at the time of its performance.

CONTRACTS WHICH CANNOT BE SPECIFICALLY ENFORCED

1. **Contracts not specifically enforceable** (Sec. 14). The following contracts cannot be specifically enforced :

(1) *Contracts in which damages are an adequate relief.* A contract for the non-performance of which compensation in money is an adequate relief, specific performance cannot be enforced.

Example. A contracts to sell and *B* contracts to buy 100 bags of farm wheat at Rs. 625 per bag. The wheat is easily saleable and available in the market. The contract cannot be specifically enforced as *A* and *B* can both be adequately compensated in money if there is a breach of contract.

An equitable rule contained in Sec. 23 may also be noted.

Liquidation of damages not a bar to specific performance (Sec. 23). Liquidated damages are a sum named in a contract to be paid in case of its breach. They are in themselves no bar to specific performance even if the party in default is willing to pay the same. But having regard to the terms of the contract and other attending circumstances, the Court must be satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance.

When specific performance under Sec. 23 is enforced, the Court shall not decree payment of the sum so named in the contract.

Example. A contract between *A* and *B* provides for the lease of *A*'s house for 7 years and in case of default for Rs. 2,000 as damages. The Court may enforce specific performance of the contract.

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(2) *Contract involving personal qualification or volition.* A contract *(a)* which runs into such minute or numerous details, or *(b)* which is so dependent on the personal qualification or volition of the parties, or *(c)* otherwise from its nature is such that the Court cannot enforce specific performance of its material terms, will not be specifically enforced.

Examples. (a) A contract to marry (*Purshottam* v. *Purshottam*, 21 Bom. 33).

(b) A contract to write a book or paint a picture.

(c) A contract to sing for a definite period (*Lumley* v. *Wagner*, (1852) 50 De G.M. & G. 604).

The effect of awarding specific performance in the above cases would be highly undesirable from two points of view, *viz., first*, they would involve continual supervision by the Court, and *secondly*, they would involve harsh and unconscionable compulsion of the contract into a state of contractual slavery (*Callianji* v. *Narsi*, (1884) 18 Bom. 702).

(3) *Contracts which by their nature are determinable.* A contract which is in its nature determinable or which purports to confer rights which may be extinguished at the will of the defendant, will not be specifically enforced.

Example. A and *B* enter into a contract as partners in a firm. The contract does not specify the duration of the partnership or provide for the determination of partnership. The contract cannot be specifically enforced. For if it were, either *A* or *B* may dissolve the partnership.

(4) *Contracts involving continuous supervision of the Court.* A contract the performance of which involves the performance of a continuous duty which the Court cannot supervise, will not be specifically enforced.

Some of the contracts generally placed under this head are: *(a)* a contract for the working of mines ; *(b)* a contract to maintain an inn or to manage and operate a rail road ; *(c)* a contract to keep a farm well stocked with horses and cattle ; *(d)* a contract to support a person as a member of one's household ; *(e)* a contract to furnish news to a publishing company for a number of years : *(f)* a contract to build or repair.

The principal ground for refusing specific performance in such cases seems to be that it would not be expendient, even if it be possible, for the Court to devote itself in enforcing such contracts.

(5) *Contracts for arbitration.* A contract to refer present or future differences to arbitration shall not be specifically enforced except as provided by the Arbitration Act, 1940. But if any person who has made such a contract (other than an arbitration agreement to which the provisions of the Aribitration Act, 1940 apply) and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

2. **Contract to sell or let property by one who has no title** (Sec. 17). A contract to sell or let any immoveable property cannot be specifically enforced in favour of a vendor or lessor—

(a) who knowing himself not to have any title to the property, has contracted to sell or let the property ;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the Court

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for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt.

The above provisions also apply, as far as may be, to contracts for the sale or hire of movable property.

3. **Discretion of Court** (Sec. 20). In the following cases, the Court may properly exercise discretion not to decree specific performance :

(1) *Contract giving unfair advantage to the plaintiff.* A contract, though not voidable, may sometimes give to the plaintiff an unfair advantage over the defendant. This may be due to *(i)* the terms of the contract or the conduct of the parties at the time of entering into contract, or *(ii)* other circumstances under which the contract was entered into. In case of such a contract the Court may exercise the discretion not to decree specific performance.

Examples. (a) A contracts to sell, and *B* contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. *B* does not know of this circumstance, and *A* conceals it from him. Specific performance of the contract should be refused to *A*.

(b) A's property is put up to auction. *B* requests *C, A*'s attorney, to bid for him. *C* does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer, and cease to compete. The lot is knocked down to *B* at a low price. Specific performance of the contract should be refused to *B*.

(c) A contracts to sell to *B* the interest of *C* in certain stock in trade. It is stipulated that the sale shall stand good, even though it should turn out that *C*'s interest is worth nothing. In fact the value of *C*'s interest depends on the result of certain partnership accounts, in which he is heavily in debt to his partners. The indebtedness is known to *A* but not to *B*. Specific performance of the contract should be refused to *A*.

(2) *Performance involving hardship on the defendant.* Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performace would involve no such hardship on the plaintiff, the Court may exercise the discretion not to decree specific performance.

Examples. (a) A is entitled to some land under his father's will on condition that, if he sells it within 25 years, half the purchase money shall go to *B*. *A* forgettir; the condition contracts before the expiration of the 25 years, to sell the land to *C*. Here the enforcement of the contract would operate so harshly on *A* that the Court will not compel its specific performance in favour of *C*.

(b) A contracts with *B* to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that *A* cannot make the the road without exposing himself to litigation. Specific performance of the part of the contrant relating to the road should be refused to *B* though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(c) A contracts to buy certain land from *B*. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to *B*.

Mere inadequancy of consideration or the mere fact that the contract is onerous to the defendant or improvident in its nature shall not be be deemed to constitute hardship.

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Further, the question whether the performance of a contract would involve hardship on the defendant, shall be determined with reference to the circumstances existing at the time of the contract.

(3) *Circumstances making contract inequitable.* Where the defendant entered into the contract under circumstances which though not rendering the contract voidable, make it inequitable to enforce specific performance, the Court may exercise the discretion not to enforce specific performance.

4. **Other contracts which equity will not enforce.** These include :

(a) Contracts which are not valid at law, *e.g.*, agreements without consideration, illegal or immoral agreements.

(b) Contracts to build or repair [*Wolver Hampton Corporation* v. *Emmons* (1901) 1. K.B. 515].

(c) Contracts lacking mutuality.

Exceptions [Sec. 14 (3)]

In the following cases the Court may enforce specific performance :

(1) *Contract to execute a mortgage.* Where the suit is for the enforcement of a contract to execute a mortgage or furnish any other security for securing the repayment of any loan which the borrower is not willing to repay at once, the Court may enforce specific performance. But where only a part of the loan has been advanced, the lender must be willing to advance the remaining part of the loan in terms of the contract.

(2) *Contract to take up debentures.* Where the suit is for the enforcement of a contract to take up and pay for debentures of a company, the Court may enforce specific performance.

(3) *Suit for the execution of a formal deed of partnership.* The Court may enforce specific performance where the suit is for—

(i) the execution of a formal deed of partnership, the parties having commenced to carry on the business of the partnership ; or

(ii) the purchase of a share of a partner in a firm.

(4) Contract for construction of any building. Where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land, the Court may enforce specific performance, provided the following conditions are fulfilled, namely :

(i) the building or other work is described in the contract in terms sufficiently precise to enable the Court to determine the exact nature of the building or work ;

(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief ; and

(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to executed.

DEFENCES TO AN ACTION FOR SPECIFIC PERFORMANCE

The following defences may be set up by a defendant to an action for specific performance of a contract which is valid in law :

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1. *Contract by a trustee in excess of his powers.* A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced.

2. *Specific performance of part of contract where unperformed part is large.* Where the plaintiff has not performed a considerable part of the whole of his part of contract, the defendant may set up the plea of non-performance. It makes no difference whether the part left unperformed admits of, or does not admit of, compensation in money.

3. *Unperformed part of contract not separate and independent.* Where the unperformed part of a contract, taken by itself, does not stand on a separate and independent footing from another part of the same contract, the defendant *can set up the defence of non-performance.*

4. *Contracts not specifically enforceable.* There are certain contracts which cannot or may not be specifically enforced. These have already been discussed in detail. In all these cases, the defendant can set up the defence of unenforceability of these contracts.

5. *Non-enforcement except with variation* (Sec. 18). Sometimes, when a plaintiff seeks specific performance of a contract in writing, the defendant may set up the defence of variation to it. In such cases (as given below) the plaintiff cannot obtain the performance sought, except with the variation so set up :

(a) Where by fraud, mistake of fact or misrepresentation, the written contract of which performance is sought— *(i)* is in its terms or effect different from what the parties agreed to, or *(ii)* does not contain all the terms agreed to between the parties on the basis of which the defendant entered into the contract ;

> *Example.* *A* sues *B* to compel specific performance of a contract in writing to buy a dwelling-house. *B* proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by *B*.

(b) Where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to to produce ;

> *Example.* *A* and *B* enter into negotiations for the purpose of securing land to *B* for his life, with remainder to *A*'s issue. They execute a contract the terms of which are found to confer an absolute ownership on *B*. The contract so framed cannot be specifically enforced.

(c) Where the parties have, subsequently to the execution of the contract, varied its terms.

> *Example.* *A* contracts in writing to let a house to *B*, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing ; so, with *B*'s consent *A* pulls it down, and erects a new house in its place. *B* contracting orally to pay rent at Rs. 120 per mensem. *B* then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variation made by the subsequent oral contract.

Sec. 18 clearly provides that when fraud or mistake of fact or misrepresentation has induced the defendant to sign an agreement, the agreement can only be enforced on the terms which the defendant intended.

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6. *Delay or laches.* If time is of the essence of the contract, failure on the part of the plaintiff to perform his part of the contract within the agreed or reasonable time, is defence to an action for specific performance of the contract.

PARTIES TO AN ACTION FOR SPECIFIC PERFORMANCE

The law on the parties to an action for specific performance may be discussed under the following two heads :

1. Persons who may obtain specific performance.
2. Persons against whom contracts may be specifically enforced.

1. Persons who may obtain specific performance (Sec. 15)

Except as otherwise provided by Chapter II (which deals with specific performance of contracts— Secs. 5 to 25), the specific performance of a contract may be obtained by —

(1) *Parties to the contract.* The general rule is that the specific performance of a contract may be obtained by the parties to the contract.

(2) *Representative-in-interest.* The specific performance of a contract may also be obtained by a representative-in-interest or the principal of any party thereto. Where the contract involves any learning, skill, solvency or any personal quality of a party and this is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative-in-interest or his principal shall not be entitled to specific performance of the contract, unless such party has already performed his part of the contract or the performance thereof by his representative-in-interest or his principal, has been accepted by the other party.

(3) *Any person beneficially entitled.* Where the contract is a settlement on marrige, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder may claim specific performance.

'Settlement' means an instrument (other than a will) whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of [Sec. 2 (*b*)].

(4) *Remainder-man.* Where the contract has been entered into by a tenant for life in due exercise of a power, the remainder-man (one to whom an interest in an estate is to go after a certain other event happens) may obtain specific performance.

(5) *Reversioner.* A reversioner (one to whom future possession of property after a particular evert is to revert or return) may obtain specific performance—

(a) where he is in possession and the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant ; and

(b) where he is a reversioner in remainder (an interest in an estate to come into effect after a certain other event happens) and the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach.

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(6) *Company arising out of amalgamation.* When a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation may obtain specific performance.

(7) *Company.* When the promoters of a company have before its incorporation entered into a contract for the purposes of the company and such contract is warranted by the terms of the incorporation, the company may obtain specific performance. The company is entitled to do so only if it has accepted the contract and has communicated such acceptance to the other party to the contract.

Personal bars to relief (Sec. 16). Specific performance of contract cannot be enforced in favour of a person—

(a) who would not be entitled to recover compensation for its breach ; or

(b) who *(i)* has become incapable of performing, or *(ii)* violates any essential term of the contract that on his part remains to be performed, or *(iii)* acts in fraud of the contract, or *(iv)* wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract ; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms the performance of which has been prevented or waived by the defendant. This Clause is based on the maxim "he who seeks equity, must do equity." [*Kirpal Singh* v. *Kartaro*, A.I.R. (1980) Raj. 123].

Where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court. Further the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

2. Persons against whom contract may be specifically enforced (Sec. 19)

Expect as otherwise provided, specific performance of a contract may be enforced against—

(1) either party thereto ;

(2) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract ;

Examples. (a) A contracts to convery certain land to *B* by a particular day. *A* dies intestate (without leaving a will) before that day without having conveyed the land. *B* may compel *A*'s heir or other representative-in-interest to perform the contract specifically.

(b) A contracts to sell certain land to *B* for Rs. 5,000. He afterwards conveys the land for Rs. 6,000 to *C*, who has notice of the original contract. *B* may enforce specific performance of the contract as against *C*.

(c) A contracts to sell land to B for Rs. 5,000. *B* takes possession of the land. Afterwards *A* sells it to *C* for Rs. 6,000. *C* makes no enquiry of *B*, relating to his interest in the land. *B*'s possession is sufficient to affect *C* with notice of his interest and he may enforce specific performance of the contract against *C*.

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(d) *A* contracts, in consideration of Rs. 10,000, to bequeath certain of his lands to *B*. Immediately after the contract *A* dies intestate, and *C* takes out administration to his estate. *B* may enforce specific performance of the contract against *C*.

(3) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

Example. *A*, the tenant for life of an estate, with remainder to *B*, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to *C* who has notice of the settlement. Before the sale is completed *A* dies. *C* may enforce specific performance of the contract against *B*.

(4) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(5) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company : provided the company has accepted the contract and communicated such acceptance to the other party to the contract.

INJUNCTION

(Secs. 36 to 42)

Where a party is in breach of a negative term of a contract (*i.e.*, where he is doing something which he promised not to do), the Court may, by issuing an order, restrain him from doing what he promised not to do. Such an order of the Court is known as an 'injunction'.

Prohibitory and mandatory injunctions. Halsbury defines an injunction as "a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing". Thus the order of the Court which restrains the commission of a wrongful act or continuance of some wrongful omission, is called an injunction. In the former case the injunction is called *prohibitory* or *restrictive* injunction : in the latter case it is called *mandatory* or *compulsive* injunction.

Object of injunction. The object of an injunction "is to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions and to secure the permanent enjoyment of, or the rights to, property." By means of it "one who has invaded or is threatening to invade the rights, legal or equitable of another, is restrained from continuing or commencing such wrongful act."

Examples. *(a)* *W* agreed to sing at *L*'s theatre, and during a certain period to sing nowhere else. Afterwards *W* contracted with *Z* to sing at another theatre and refused to perform the contract with *L*. *Held*, *W* could be restrained by injunction from singing for *Z* (*Lumley* v. *Wagner*, (1852) 5 De G.M. & G. 604].

(b) *N*, a film actress, agreed to act exclusively for *W* for a year and for no one else. During the year she contracted to act for *Z*. *Held*, she could be restrained by injunction from doing so [*Warner Bros.* v. *Nelson*, (1937) 1 K.B. 209].

(c) The directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

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(d) The directors of a fire and life insurance company are about to engage in marine insurance. Any of the shareholders may sue for an injunction to restrain them.

Power of Court to grant injunction is discretionary. The grant of an injunction by the Court is normally discretionary, but there seems no reason why the Court should refuse the grant of an injunction to restrain the breach of a contract—

(a) whereby a promisor undertakes not to do something, *e.g.*, not to carry on a certain trade [*Nordefelt* v. *Maxim Nordenfelt Co. Ltd.*, (1894) A.C. 535] ; or

(b) which is negative in substance although not in form.

Example: G agreed to take the whole of the electric energy required by his premises from *M. Held*, this was in substance an agreement not to take energy from any other person and it could be encorced by injunction [*Metropolitan Electric Supply Co.* v. *Ginder*, (1901) 2 Ch. 799].

Preventive relief (Sec. 36). Specific relief given by forbidding a party from the commission of a wrongful act, is called preventive relief. It is granted at the discretion of the Court by injunction, temporary or perpetual.

KINDS OF INJUNCTION

An injunction may be—

1. Temporary, interlocutory, or *ad interim*,
2. Perpetual or permanent,
3. Mandatory,
4. *Ex parte*.

Temporary and perpetual injunctions (Sec. 37)

1. **Temporary.** A temporary injunction is such as is to continue unitl a specified time, or unitl the further order of the Court. It may be granted at any stage of a suit and is regulated by the Code of Civil Procedure, 1908. It does not conclude or determine a right. Its object is to preserve the matter or the disputed property in *status quo* until the case is finally disposed of by the Court. It may be granted, for example, where *(a)* the property in dispute in a suit is in danger of being wasted or alienated by any party to the suit, or *(b)* the defendant threatens or intends to remove or dispose of his property with a view to defrauding his creditors.

No doubt granting of *ad interim* injunction is discretionery but the discretion has to be exercised on sound judicial principles. In case it is established that the plaintiff has a *prima facie* case, that he is likely to suffer irreparable injury before his legal right can be established and that the mischief done to him by withholding the injunction is greater than that which is likely to arise from granting it, then Courts grant ad interim inunctions [*Parveen Chander* v. *Raj Kumar*, A.I.R. (1980) P. & H. 216].

2. **Perpetual injunction.** A perpetual injunction can only be granted by a decree made at the hearing and upon the merits of the suit ; the defendant is thereby perpetually enjoined from the assertion of a right, or from commission of an act, which would be contrary to the rights of the plaintiff. It is

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granted only after full trial or hearing of the case when a right is firmly established.

Difference between temporary and perpetual injunction. The important differences between temporary and perpetual injunctions are as follows :

1. A temporary injunction is such as is to continue until a specified time and may be granted at any stage of suit. A perpetual injunction can only be granted by a decree at the hearing and upon the merits of the case.

2. A temporary injunction is provisional in its nature. It does not conclude or determine a right. A perpetual injunction, on the other hand, finally determines the rights of the parties.

3. A temporary injunction may be granted to the planiftiff if he makes out a *prima facie* strong case in his support. Its life is the duration of the trial. If the plaintiff wins, it is converted into a perpetual injunction. If he loses, it is cancelled. The perpetual injunction is granted only upon the merits of the suit.

4. A temporary injunction is regulated by the provisions of the Code of Civil Procedure, 1908 but a perpetual injunction is regulated by the provisions of the Specific Relief Act, 1963.

Perpetual injunction when granted (Sec. 38). A perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his gavour, whether expressly or by implication. When any such obligation arises from a contract, the Court shall be guided by the rules and provisions relating to "specific performance of contracts".

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases, namely—

(1) Where the defendant is trustee of the property for the plaintiff ;

(2) Where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion ;

(3) Where the invasion is such that compensation in money would not afford adequate relief ;

(4) Where the injunction is necessary to prevent a multiplicity of judicial proceedings.

Examples. (a) A lets certain lands to *B*, and *B* contracts not to dig or grave thereout. *A* may sue for an injunction to restrain *B* from digging in violation of this contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent breach.

(c) A is *B*'s medical adviser. He demands money of *B*, which *B* declines to pay. *A* then threatens to make known the effect of *B*'s communications to him as patient. This is contrary to *A*'s duty and *B* may sue for an injunction to restrain him from so doing.

(d) A, the owner of two adjoining houses, lets one to *B*, and afterwards lets the other to *C*. *A* and *C* begin to make such alteration in the house let to *C* as will prevent the comfortable enjoyment of the house let to *B*. *B* may sue for an injunction to restrain them from doing so.

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(e) The inhabitants of a village claim a right of way over *A*'s land. In a suit against several of them, *A* obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues *A* for obstructing his alleged right to way over the land. *A* may sue for an injunction to restrain them.

(f) *A* and *B* are in possession of contiguous lands and the mines underneath them. *A* works his mines so as to extend under *B*'s mines, and threatens to remove certain pillars which help to support *B*'s mine. *B* may sue for an injunction to restrain him from doing so.

(g) *A* ring bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with physical comfort of the occupier, *B*. *B* may sue for an injunction restraining *A* from making the noise.

(h) *A* pollutes the air with smoke so as to interfere materially with the physical comfort of *B* and *C*, who carry on business in neighbouring house. *B* and *C* may sue for an injunction to restrain the pollution.

(i) *A* infringes *B*'s patent. If the Court is satisfied that the patent is valid, and has been infringed, *B* obtain an injunction to restrain the infringement.

(j) *A* carries on manufactory, and *B* is his assistant. In the course of this business *A* imparts to *B* a secret process of value. *B* afterwards demands money of *A*, threatening, in case of refusal, to discolse the process to *C*, a rival manufacturer. *A* may sue for an injunction to restrain *B* from disclosing the process.

Quia timet injunction. When an injunction is granted in the discretion of the Court to prevent a threatened wrong, it is called a *quia timet* injunction. It is granted because the plaintiff fears *(quia timet)* that some future injury is likely to be caused to his rights or interests.

3. **Mandatory injunction** (Sec. 39). Sometimes, to prevent the breach of an obligation, it may be necessary to compel the performance of certain acts. If the Court is capable of enforcing the performance of those acts, it may in its discretion grant an injunction—

(1) to prevent the breach complained of, and also

(2) to compel performance of the requisite acts.

The injunction granted in the above case is a mandatory injunction. It requires the defendant first to restore, as far as possible, the *status quo ante*, *i.e.*, the former state of things, and then restrains him from future wrongful acts. It is in its nature both restitutory (restoration of a former state or position) and prohibitory.

Examples. (a) *A*, by new buildings, obstructs light to the access and use of which *B* has acquired a right under the Limitation Act, 1963. *B* may obtain an injunction not only to restrain *A* from going on with the buildings, but also to pull down so such of them as obstructs *B*'s light.

(b) *A* builds a house with eaves projecting over *B*'s land. *B* may sue for an injuction to pull down so much of the eaves as so project.

(c) *A* threatens to publish statements concerning *B* which would be punishable under the Indian Penal Code, 1860. The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to *B*.

(d) *A* being *B*'s medical adviser, threatens to publish *A*'s written communications with him, showing that *B* has led an immoral life. *B* may obtain an injunction to restrain the publication.

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4. **Ex parte injunction.** Sometimes the circumstances in a case may be such that any delay in the grant of even a temporary injunction to the plaintiff would substantially harm his interest and may result in a situation which cannot be later undone. In such a case if the Court is convinced of the urgency of the matter, it may grant an injunction even without hearing the other party. Such an injunction is called an *ex parte* injunction. It is granted normally for a very short period. It continues till the Court hears the other party against its continuation. After hearing the other party, the Court may either discharge it or extend it till the final disposal of the case.

Damages in lieu of or in addition to injunction (Sec. 40). The plaintiff in a suit for perpetual injunction under Sec. 38, or mandatory injunction under the Sec. 39, may claim damages either in addition to, or in substitution for, such injunction. If the Court thinks fit, it may award such damages. This relief for damages is not granted unless the plaintiff has claimed such relief in his plaint. If such damages have not been claimed in the plaint, the Court shall, at any stage of the proceeding, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff bars his right to sue for damage for such breach.

Injunction when refused (Sec. 41)

An injunction cannot be granted—

(1) to restrain any person from prosecuting a judicial proceeding at the institution of the suit in which the injunction is sought. If restraint is necessary to prevent a multiplicity of proceedings, injunction may be granted ;

(2) to restrain any person from instituting or prosecuting any proceeding in a Court not subordinate to that from which the injunction is sought ;

(3) to restrain any person from applying to any legislative body ;

(4) to restrian any person from instituting or prosecuting any proceeding in a criminal matter ;

(5) to prevent the breach of a contract the performance of which would not be specifically enforced ;

(6) to prevent, on the ground of nuisance, any act of which it is not reasonably clear that it will be a nuisance ;

(7) to prevent a continuing breach in which the plaintiff has acquiesced ;

(8) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust ;

(9) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the Court ;

(10) when the plaintiff has no personal interest in the matter.

Examples (a) A seeks an injunction to restrain his partner, *B*, from receiving the partnership debts and effects. It appears that *A* had improperly possessed himself of the books of the firm and refused *B* access to them. The Court will refuse the injunction.

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(b) *A* manufactures and sell crucibles, designating them as 'patent plumbago crucibles', though, in fact, they have never been patented. *B* pirates the design. *A* cannot obtain an injunction to restrain the piracy.

Injunction to perform negative agreement (Sec. 42)

Sometimes a contract may comprise of two agreements—an affirmative agreement to do a certain act and a negative agreement, express or implied, not to do a certain act. In such a case if the Court is unable to compel specific performance of the affirmative agreement, it may grant an injunction to perform the negative agreement. But before the Court does that it shall see that the plaintiff has not failed to perform the contract so far as it is binding on him.

Sec. 42 is an exception to the rule that there can be no injunction where there can be no specific performance. It is based on the principle laid down in the leading case of *Lumely* v. *Wanger* (1852) De. G.M. & G. 604.

Example. *A* contracts with *B* to sing for 12 months at *B*'s theatre and not to sing in public elsewhere. *B* cannot obtain specific performance of the contract to sing. But he is entitled to an injunction restraining *A* from singing at any other place of public entertainment.

Essential requirements of Sec. 42. (1) The contract must consist of two agreements, *viz.*, *(a)* an affirmative agreement to do a certain act, and *(b)* a negative agreement, express or implied, not to do a certain act.

(2) The contract must be divisible and the negative part must be capable of being separated from the rest of the contract.

(3) The applicant must not have failed to perform the contract so far as it is binding on him.

Examples. *(a)* *A* contracts to sell to *B* for Rs. 10,000 the goodwill of a certain business unconnected with business premises, and further agrees not to carry on that business in Calcutta. *B* pays *A* the Rs. 10,000 but *A* carries on the business in Calcutta. The Court cannot compel *A* to send his customers to *B*, but *B* may obtain an injunction restraining *A* from carrying on the business in Calcutta.

(b) *A* contracts to sell to *B* the goodwill of a business. *A* then sets up a similar business close to *B*'s shop, and solicits his old customers to deal with him. This is contrary to his implied contract. *B* may obtain an injunction to restrain *A* from soliciting the customers, and from doing any act whereby their goodwill may be withdrawn from *B*.

(c) *A* contracts with *B* that he will serve him faithfully for 12 months as a clerk. *B* is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining *A* from serving a rival house as a clerk.

(d) *A* contracts with *B* that on consideration of Rs. 1,000 to be paid to him by *B* on a day fixed *A* will not set up certain business within a specified distance. *B* fails to pay the money. *A* cannot be restrained from carrying on the business within the specified distance.

DECLARATORY DECREES
(Secs. 34 and 35)

A declaratory decree of a Court is a decree which declares that the plaintiff is entitled to any legal character or to any right as to any property against the defendant who denies his title to such character or right.

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Legal character. It means 'legal status' as legitimacy, marriage, divorce and adoption. For example, a plaintiff may sue for a declaration that the defendant is not his wife or her husband.

Legal right. It means every right or interest which is recognised and protected by the State. *i.e.*, by the laws of the State. Every legal right involves a legal duty or obligation. A declaration may be sought and made in respect of a legal right, *e.g.*, a right to property.

Discretion of Court as to declaration of legal status or right (Sec. 34). Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying. or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief. But no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Examples. (a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim right of way across the land. *A* may sue for a declaration that they are not entitled to the right so claimed.

(b) A covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trust are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

(c) A alienates to *B* property in which *A* has merely a life interest. The alienation is invalid as against *C*, who is entitled as reversioner. The Court may, in a suit by *C*, against *A* and *B*, declare that *C* is so entitled.

(d) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(e) A is in possession of certain property. *B*, alleging that he is the owner of the property, requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property.

The main object of Sec. 34 is to dispel a cloud cast upon the legal character or title of the plaintiff who seeks the aid of the Court to get the declaration so that he can peacefully enjoy the legal character or title without any fear of disturbance.

Requisites for a declaratory decree

The essential requisites for a declaratory relief are as follows :

(1) The plaintiff is, at the time of the suit, entitled to some legal character or to any right as to any property. It is only where such legal character or right is claimed that Sec. 34 will apply or give a right to a suit for a declaration.

(2) The defendant has denied the plaintiff's character, or his right to any property, or is interested in denying his character or right. The declaration cannot be sought on speculative grounds.

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(3) The declaration asked for is a decclaration that the plaintiff is entitled to a legal character or to a right to any property.

(4) The plaintiff is not in a position to claim further relief than a mere declaration of his title.

(5) The Court, after a consideration of all the circumstances considers it proper to exercise its discretion to grant the relief.

Effect of declaration (Sec. 35)

A declaration made under Sec. 34 is binding only on—

(1) the parties to the suit,

(2) persons claiming through them respectively, and

(3) where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Example. A, a Hindu, in a suit to which B, his alleged wife, and her mother are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal right. The Court makes the declaration and order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.

The declaratory judgment given under Sec. 34 is a judgment in *personam* and not a judgment *in rem*.

RECTIFICATION OF INSTRUMENTS

(Sec. 26)

When through fraud or a mutual mistake of the parties, a contract or other instrument in writing (not being the Articles of Association of a company to which the Companies Act, 1956 applies) does not express their real intention, then—

(a) either party or his representative-in-interest may institute a suit to have the instrument rectified ; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instruments be rectified ; or

(c) a defendant in any such suit as is referred to in Clause *(b)* may, in addition to any other defence open to him, ask for rectification of the instrument.

Examples. (a) A agrees with B to sell his house together with one of the 3 godowns adjacent to it but in the deed of agreement purporting to incorporate this agreement all the 3 godowns are, either by common mistake or the fraud of B, included under the terms of the sale. The Court may bind the parties to the real agreement.

(b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband, to pay to C, his executors, administrators, and assignees, during A's life an annuity of Rs. 5,000. C dies insolvent and the Official Assignee claims the annuity from A. The Court on finding that the settlement clearly provided that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement, and decree that the assignee has no right to any part of the annuity.

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Collect observes in this regard as follows :

"The fundamental assumption is that there exists, in truth, between the parties a complete and perfectly unobjectionable contract, but the writing designed to embody it, either from fraud or mutual mistake, is incorrect and relief sought is to rectify the writing so as to bring it into conformity with the true intent. In such a case to enforce the instrument as it stands must be to injure at least one party to it; to rescind it altogether must be to injure both but to rectify it and then enforce it is to injure neither but to carry out the intention of both. In cases of rectification, the Court does not put it to the other party to submit to the variation alleged but makes the instrument conformable to the intention of the parties without any such offer or submission."

Sec. 26 also specifically provides that if in any suit in which a contract or other instrument is sought to be rectified, the Court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the Court may in its discretion direct rectification of the instrument so as to express the intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

Example. A intending to sell to *B* his house and one of 3 godowns adjacent to it, executes a conveyance prepared by *B*, in which, through *B*'s fraud, all 3 godowns are included. Of the 2 godowns which were fraudulently included, *B* gives one to *C* and lets the other to *D* for a rent, neither *C* nor *D* having any knowledge of the fraud. The conveyance may, as against *B* and *C*, be rectified so as to exclude from it the godown given to *C*; but it cannot be rectified so as to affect *D*'s lease.

Rectification to be claimed. Relief for the rectification of an instrument shall not be granted to any party under Sec. 26 unless it has been specifically claimed. Further, where a party has not claimed any such relief in its pleading, the Court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim.

Rectification and specific enforcement. A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the Court thinks fit, may be specifically enforced.

RESCISSION OF CONTRACTS
(Secs. 27 to 30)

'Rescission' means the revocation of a contract. It is an equitable remedy which is converse to that of specific performance. It relieves parties from the obligations of a contract which is void or becomes void at the option of the aggrieved or innocent party. In case the contract is void or inoperative, the Court may decree rescission at the instance of either party. If the contract is voidable, rescission is not decreed at the instance of the guilty party.

When rescission may be adjudged or refused (Sec. 27)

Adjudgment of rescission. Any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases, namely—

(1) Where the contract is voidable or terminable by the plaintiff.

Example. A sells a field to *B*. There is a right of way over the field of which *A* has direct personal knowledge, but which he conceals from *B*. *B* is entitled to have the contract rescinded.

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A terminable contract is one which contains a stipulation that if a party fails to fulfil an obligation or a term of the contract within the stipulated time, the other party may terminate or put an end to the contract.

(2) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

Example. *A*, an attorney, induces his client *B*, a Hindu widow, to transfer property to him for the purpose of defrauding *B*'s creditors. Here the parties are not equally in fault and *B* is entitled to have the instrument of transfer rescinded.

Refusal of rescission. The Court may refuse to rescind a contract —

(a) where the plaintiff has expressly or impliedly ratified the contract ; or

(b) where, owing to the change of circumstances which has taken place since the making the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; *e.g.*, where the subject-matter of contract has been destroyed or consumed or its value or quality appreciably diminished ; or

(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value ; or

(d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract. Contract, in relation to the territories to which the Transfer of Property Act, 1882 does not extend, means a contract in writing.

Rescission in certain circumstances of contracts for sale or lease of immovable property (Sec. 28)

Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree, pay the purchase-money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit for rescission of the contract. On such application, the Court may rescind the contract.

Rescission in suit for specific performance (Sec. 29)

A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative for the rescission of the contract if it cannot be specifically enforced. If the Court refuses to enforce the contract specifically, it may direct the contract to be rescinded.

Restoration of benefit (Sec. 30)

When a party treats the contract as rescinded, he is liable to restore any benefits he has received under the contract to the party from whom such benefits were received. But if a person rightfully rescinds a contract he is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract by the other party (Secs. 64 and 75 of the Indian Contract Act, 1872).

Sec. 30 of the Specific Relief Act, 1963 also provides in this regards as follows : "On adjudging the rescission of a contract, the Court may require the

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party to whom such relief is granted to restore, so far as may be, any benefit which he may have received from the other party and to make any compensation to him which justice may require."

CANCELLATION OF INSTRUMENTS
(Secs. 31 to 33)

Cancellation (Sec. 31)

A written document which is void or voidable against a person may cause him in some cases a serious injury, if it is left outstanding. In such a case, if he has any such apprehension, he may file a suit to have the document adjudged void or voidable. The Court may, in its discretion, adjudge such a document void or voidable and order it to be delivered up and cancelled.

The underlying principle of relief under Sec. 31 is founded upon the administration of protective justice for fear. The party is relieved upon the principle, as it is technically called *quia timet*, that is for fear that such agreement, securities, deeds or other instruments may be vexatiously and injuriously used against him when the evidence to impeach them may be lost, or that they may throw a cloud of suspicion over his title or interest.

Examples. (a) A, the owner of a ship, by fraudulently representing her to be seaworthy, induces *B*, an underwriter, to insure her. *B* may obtain the cancellation of the policy.

(b) A conveys land to *B*, who bequeaths it to *C*, and dies. Thereupon *D* gets possession of the land, and produces a forged instrument, stating that the conveyance was made to *B* in trust for him. *C* may obtain the cancellation of the forged instrument.

(c) A, representing that the tenants on his land were all at will, sells it to *B*, and conveys it to him by an instrument, dated the 1st October, 1993. Soon after that day, *A* frauduently grants to *C* a lease of part of the lands, dated the 1st September, 1990, and procures the lease to be registered under the Registraction Act, 1908. *B* may obtain the cancellation of the lease.

(d) A agrees to sell and deliver a ship to *B*, to be paid for by *B*'s acceptances of 4 bills of exchange, for sums amounting to Rs. 3,00,00,000 to be drawn by *A* on *B*. The bills are drawn and accepted, but the ship is not delivered according to the agreement. *A* sues *B* on one of the bills. *B* may obtain the cancellation of all the bills.

Conditions for the relief. In a suit for cancellation of an instrument, the plaintiff must make out—

1. That the instrument sought to be cancelled is void or voidable against the plaintiff ;

2. That he has reasonable apprehension of serious injury from the instrument if it is left outstanding ;

3. That the apprehended injury is serious ; and

4. That in view of the circumstances of the case the Court considers it reasonable and necessary to cancel the document.

If the instrument has been registered under the Registration Act, 1908, the Court shall also send a copy of its decree to the officer in whose office the

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instrument has been so registered ; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Partial cancellation of instrument (Sec. 32)

Where an instrument is evidence of different rights or obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

Example. A draws a bill on B, endorses it to C, by whom it appears to be endorsed to D, who endorses it to E. C's endorsement is forged. C is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

Restoration of benefit (Sec. 33)

On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

A defendant may sometimes successfully resist a suit on the ground that the instrument sought to be enforced against him in the suit is voidable. In such a case, the Court may, if he has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it. If, however, the agreement is void by reason of the defendant not having been competent to contract under Sec. 11 of the Indian Contract Act, 1872 (*e.g.*, where he is a minor), the Court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to extent to which he or his estate has benefited thereby.

TEST QUESTIONS

1. What specific reliefs are available to the plaintiff under the Specific Relief Act, 1963 ?
2. What is specific relief ? How is it given ?
3. Enumerate the contracts which *(a)* can be, *(b)* cannot be, specifically enforced.
4. When may the Court order specific performance of a contract and when must it refuse to do so ? *(C.S.E. December 1989, June 1990)*
5. Who may obtain specific performance of a contract ? Are there any personal bars in this regard ?
6. "Specific performance cannot be enforced in favour of certain persons." Who are they ?
7. Write a note on discretion of the Court as to decreeing specific performance.
8. When may an instrument be rectified, rescinded or cancelled ?
9. When may rescission of a contract be refused by the Court ?
10. Under what circumstances can a person sue for the cancellation of an instrument ?
11. What is a declaratory decree ? When can the Court refuse to grant such a decree ? What is the effect of such a decree. *(C.S.E. June 1992)*
12. State the nature of preventive relief granted under the Specific Relief Act, 1963.
13. *(a)* What is an injunction ? When does the Court grant perpetual injunction ?
    (b) Distinguish between temporary injunction and permanent injunction *(C.S.E. December 1989)*
14. Write a note on different kinds of injunctions.

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15. *(a)* What are the cases in which injunction cannot be granted under the Specific Relief Act, 1963 ?

(*b*) Write a short note on mandatory injunction. *(C.S.E. October 1978)*

16. "Sec. 42 is to injunctions what Sec. 12 is to specific performance." Discuss.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *X* contracts with B & Co. a publisher, to write a book on the Companies Act 1956 and takes an advance of Rs. 5,000. Later on X refuses to write the book. Can the contract be specifically enforced ? *(C.S.E. June 1991)*

[Hint : No, as the contract involves personal skill].

2. In the course of *A*'s employment as an adcocate certain papers belonging to his client *B* come into his possession. *A* threatens to make these papers public or to communicate their contents to a stranger. Can the Court grant perpetual injunction to restrain *A* from so doing ? *(C.S.E. June 1987)*

[Hint : Yes. Sec. 38].

3. *B* forcefully ejects his tenant *C* from his house. *C* wants to file a suit for recovery of possession against the landlored 6 1/2 months later. Is *C*'s suit maintainable ? *(C.S.E. June 1987)*

[Hint : No Sec. 6].

4. Dr. Agarwal agrees to perform a certain operation, takes an advance of Rs. 4,000 but later refuses to operate. Can the patient get a decree of specific performance from the Court against Dr. Agarwal ? *(C.S.E. December 1988, 1987)*

[Hint : No. as the contract involves personal skill. Sec. 14].

5. Ram contracts to sell, and Hari contracts to buy, 10 chests of indigo at Rs. 4,000 per chest. If Hari refuses to buy the indigo, can Ram get the contract specifically enforced through the Court ? *(C.S.E. December, 1987)*

[Hint : No, as damages are adequate remedy in this case. Sec. 14].

6. Lata, a singer, agreed to sing at Murali's theatre for a certain period and not to sing anywhere else during that period. Afterwards Lata entered into a contract to sing at another theatre and refused to perform her contract with Murali. Murali sued Lata for specific performance of contract and prohibitory injunction from singing in another theatre. Will Murali succeed ? *(C.S.E. June 1989, modified version in June 1993)*

[Hint : No, Sec. 14. But he may be granted prohibitory injunction restraining Lata to sing in any other theatre (Sec. 42)].

7. A dancer enters into a contract with the owner of a theatre. She agrees that she will give performance on the theatre for a period of one month and that during this period she will not give dance performance in any other theatre. Can this contract contract be specifically emforced against the dancer ? *(C.S.E. December 1992)*

[Hint : No (Sec. 14)].

8. Rajeev is disposessed of a house without his consent by Rohit, the owner, otherwise than in due course of law. Rajeev files a suit for possession under Sec. 6 of the Specific Relief Act, 1963 before the Senior Sub-judge, Delhi, within 6 months from dispossession. The said suit is decreed. Can Rohit—

(1) prefer an appeal against the decree ; and

(2) file a fresh suit for possession on the basis of his ownership ? (C.S.E. June 1989)

[Hint : (1) No, Sec. 6 (3) : (ii) Yes. Sec. 6 (4)].

9. *X* is disposessed of a house without his consent otherwise than in due course of law by *Y*. Has *X* got any remedy under the provisions of the Specific Relief Act, 1963 ? *(C.S.E. December 1990, June 1988)*

[Hint : Yes. Sec. 6 (1)].

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10. *A* gave a power of attorney to *B* to sell half of his land comprising of 30 bighas. *B* executed an agreement to sell in favour of *C* agreeing to sell entire 30 bighas of land and received Rs. 1,00,000 as earnest money and put *C* in possession of property. On dispute by *A*, *C* files a suit for specific performance. Will he succeed ?

(C.S.E. December 1989)

[Hint : Yes, subject to conditions laid down in Sec. 12 (3)].

11. Alpana agrees with Kalpana to start a courier business in partnership. Later on, Alpana decides to be a partner of Sapna. What should Kalpana do ?

(C.S.E. June 1991)

[Hint : There can be no specific performance of contract of partnership. She can only claim compensation].

12. Jeevan is constructing a building on his own plot of land. It will affect the right to privacy of Aekant. Advise Aekant. *(C.S.E. December 1992)*

[Hint : Aekant may apply to Court for perpetual injunction which may or may not be granted by the Court].

13. *A* and *B* made a contract for carrying on cloth business in partnership. Accordingly they started cloth business in partnership. Thereafter *A* requested *B* to execute a partnership deed in respect of the contract, but *B* turns down this request. Adise *A*. *(C.S.E. June 1992)*

[Hint : A can file a suit for specific performance (Sec. 14)].

14. *A* is a writer. He enters into a contract with *B* to write a book for him. *A* does not write the book. Can *B* file a suit against *A* for specific performance ? Answer with reasons.

(C.S.E. June 1993)

[Hint : No as the contract involves personal skill. Sec. 14].

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9

The Arbitration Act, 1940

Arbitration is one of the oldest methods of settling civil disputes between two or more persons by reference of the dispute to an independent and impartial third person instead of litigating the matter in the usual way through the Courts. It saves time and expense. It also avoids unnecessary technicalities and at the same time ensures 'substantial justice within limits of the law'. In *Union of India* v. *D.P. Wadia & Sons*, A.I.R. (1977) Bom. 10, it was observed that "arbitration is a domestic forum. It is a forum other than a Court of Law for determination of disputes and differences, after hearing both the sides, in a judicial manner."

The method of settling disputes and differences through the *Panchs* and *Panchayats* has always been prevalent in our country.

The Law relating to arbitration is contained in the Arbitration Act 1940. Before the enactment of this Act, the law of arbitration was contained substantially in two enactments, the Indian Arbitration Act, 1899 and the Second Schedule to the Code of Civil Procedure, 1908. The operation of the 1899 Act was limited to the Presidency towns and to such other areas to which it was extended by the appropriate Provincial Government ; its scope was confined to 'arbitration by agreement without the intervention of a Court'. The Second Schedule to the Code of Civil Procedure dealt with arbitrations outside the operation and scope of the 1899 Act ; it related for the most part to arbitration in suits, though arbitration without intervention of a Court was also briefly provided for. This Schedule also contained an alternative method whereby the parties to a dispute or any of them could file their arbitration agreement before a Court which after a certain procedure, referred the matter to an arbitrator.

The Arbitration Act, 1940 is complete, self-contained and exhaustive of the law relating to arbitration in India [*Valab Pati* v. *Narsingh*, A.I.R. (1963) Bom. 157].

The Act came into force on the first day of July, 1940 [Sec. 1 (3]. It extends to the whole of India except the State of Jammu and Kashmir [Sec. 1 (2)].

If the provisions of this Act are inconsistent with any other enactment or any rules made thereunder when the arbitration is taking place the provisions of the other enactment or rules made thereunder shall prevail. In the absence of any provision relating to any matter connected with an arbitration in a Special Act, the provisions of this Act would be followed to the extent of the omission, and for that limited purpose a statutory award made under any other enactment shall be deemed to have been made under this Act [*District Co-op. Federation* v. *Registrar, Co-op. Societies*. A.I.R. (1966) All. 489).

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Reference to Sections

References to Sections in this Chapter, unless otherwise indicated, are to the Arbitration Act, 1940.

DEFINITIONS

1. **Arbitration agreement** [Sec. 2 *(a)*]. An 'arbitration agreement, means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not . The person who is appointed to determine differences and disputes in called *arbitrator*, the proceedings before him are called an *arbitration*, and his decision is called an *award*.

Essentials of arbitration agreement. An arbitration agreement, to be valid and binding, must have the following essential elements :

(1) *Writing.* The arbitration agreement must be in *writing*, though it need not be contained in a formal document. The acceptance may be by words or by conduct [*Ram Lal* v. *Hari Bux*, A.I.R (1934) Cal. 769]. Signatures of the parties to the agreement are not necessary but it must be shown that they agreed to the settlement of disputes by arbitration [*Banarsi Dass* v. *Cane Commr.*, A.I.R. (1963) S.C. 1417].

An arbitration agreement may be contained in several documents. It may also be inferred from correspondence between the parties consisting of a number of letters [*Shankar Lal Lachhmi Narain* v. *Jainy Bros.*, A.I.R. (1931) All. 136]. Although no specific form of agreement is necessary, yet the agreement should be reduced to writing. The agreement must show the choice and determination of the parties to go to arbitration. But the naming of the arbitrator in the arbitration agreement is not necessary [*Union of India* v. *Janki Prasad Agarawal*, *A.I.R.* (1986) All. 15].

(2) *Essential elements.* The arbitration agreement must have all the essential elements of a valid contract. The parties must be *ad idem*. If the agreement is vague and uncertain and not capable of being made certain, there is really no agreement in law. The reciprocal promise and willingness of either party to abide by the decision of the arbitrator is the consideration in an arbitration agreement.

(3) *Dispute.* The arbitration agreement must be to refer a dispute or difference, present of future, between the parties to arbitration. Dispute implies an assertion of a right by one party and repudiation of the same by another [*Nand Ram* v. *Raghu Nath*, A.I.R. (1954) Cal. 254]. Where there is no dispute there is no right to demand an arbitration.

The subject-matter of an arbitration agreement may be a present dispute or a future dispute but it is necessary that the subject-matter of reference is clearly defined. Where the arbitration agreement relates to future differences, no reference under that agreement can be made until such differences have arisen. There should however be no dispute about the existence or legality of the arbitration agreement [*Chiranjilal Fulchand* v. *Dwarkadas & Co.*, (1957) 59 Bom. L.R. 1053].

(4) *Arbitrator.* The dispute between the two parties requiring settlement, present or future, shall be submitted to a third person, called arbitrator.

(5) *Intention of the parties to abide by the award.* The parties must have the intention to abide by the award given by the arbitrator.

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Frustration of contract. If a contract containing an arbitration clause comes to an end owing to frustration or is avoided on the ground of fraud, misrepresentation, undue influence or coercion, the arbitration clause continues to be binding [*Naihati Jute Mills* v. *Khyaliram*, A.I.R. (1968) S.C. 522). But if the parties are not *ad idem*, there is no contract at all and the arbitration clause is not binding [*Tolaram* v. *Birla Jute Mftg. Co.*, A.I.R. (1948) 2 Cal. 171]. Same is the case when arbitration agreement is void *ab initio* or illegal [*Hiralal Pannalal* v. *Dalhousie Jute Co. Ltd.*, A.I.R. (1978) Cal. 119]. If in a void or illegal agreement, the arbitration clause were valid, it would have the effect of negativing the Court's jurisdiction over the matters covered by the agreement. There can be nothing more preposterous than parties reconferring jurisdiction on the Court to hear the suit [*Singh* v. *Singh*, (1895) 6 Cal. L.T. 176].

2. **Award** [Sec. 2 *(b)*]. 'Award' means an arbitration award. It is discussed in detail later in this Chapter.

3. **Court** [Sec. 2 *(c)*]. 'Court' means a Civil Court having jurisdiction to decide the question forming the subject-matter of the reference if the same had been the subject-matter of a suit. 'Court' does not, except for the purpose of arbitration proceedings under Sec. 21, include a Small Cause Court.

The definition of Court having jurisdiction for arbitration matters implies two things:

(a) The Court must be a Civil Court.

(b) It must have jurisdiction to entertain a suit with regard to the subject-matter of reference.

The expression Civil Court does not include a Revenue Court [*Bithal Das Khanna* v. *Sri Nath Das Khanna*, A.I.R. (1949) All. 360] or an Insolvency Court [*MaujiLal* v. *Devi Chand*, A.I.R. (1949) Nag. 110]. But it does include an Appellate Court [*Nachiappa* v. *Subramaniam Chettiar*, A.I.R. (1960) S.C. 307].

Jurisdiction of Court (Sec. 31). Sec. 31 deals with the jurisdiction of Courts as regards conduct of arbitration proceedings and filing of awards. The various provisions of Sec. 31 are as follows :

(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) All questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been, or may be, filed, and by no other Court. This rule will not apply if the Arbitration Act expressly provides otherwise.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceeding shall be made to the Court where the award has been, or may be, filed and to no other Court.

(4) Where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings. Likewise all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court. This rule will hold good even if there is a different provision elsewhere in this Act or in any other law for the time being in force.

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4. **Legal representative** (Sec. 2 *(d)*]. 'Legal representative' means a person who in law represents the estate of a deceased person. 'Legal representative', according to the definition, includes :

(a) A person who in law represents the estate of the deceased, *e.g.*, an executor of will or administrator of the estate of the deceased.

(b) A person who intermeddles (interferes) with the estate of the deceased, *e.g.*, a person who retains possession of the properties belonging to the estate of the deceased with the intention of representing it [*Nagendra Nath* v. *Haran Chandra*, A.I.R. (1933) Cal. 865], or a trespasser or a person who claims adversely to the estate of the deceased [*Satya Ranjan Roy* v. *Sarat Chandra*. A.I.R. (1926) Cal 825].

(c) A person on whom the estate of the deceased devolves on the death of the party acting in a representative character.

5. **Reference** [Sec. 2 *(e)*]. 'Reference' means a reference to arbitration.

An agreement between the parties to refer the matter in dispute to a person and abide by his decision amounts to a reference to arbitration [*Swaminathan* v. *Moonachini*, A.I.R (1943) Rang. 407]. Although an arbitration agreement has to be in writing, the reference may be oral [*M.H. Tejani* v. *Kulsum Bai*, A.I.R. (1967) Bom. 300].

ADVANTAGES AND DISADVANTAGES OF ARBITRATION

Interminable, time-consuming, complex and expensive Court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolutions of disputes avoiding procedural claptraps and this led them to the Arbitration Act, 1940 [*Guru Nanak Foundation* v. *Rattan Singh* & Sons, A.I.R. (1981) S.C. 2075].

The principal advantages of arbitration, as compared with litigation in a Court of Law, are :

(1) avoidance of publicity, for the proceedings are held in private.

(2) Simplicity of procedure, as proceedings are held more informally.

(3) Avoidance of delay and uncertainty involved in appeals, as the award, assuming it to be valid, is final.

(4) Reduction of expense in most cases.

(5) Saving of time, as proceedings are quicker than a trial in a Court.

(6). Appointment of a person having the required technical qualification as arbitrator, should the matter be of a technical nature.

(7) Candour in presenting facts and figures, knowing that trade competitors are not present to gain knowledge to the detriment of the person giving the evidence.

The principal disadvantages of arbitration are :

(1) the arbitrator may be incompetent (both in the trade and in the legal aspects of the matter) or biased ; and

(2) injustice may result from the informality of the procedure.

The Supreme Court in *Guru Nanak Foundation* v. *Rattan Singh & Sons*, A.I.R. (1981) S.C. 2075 while enumerating the disadvantages of arbitration, very aptly observed:

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"The way in which proceedings under the Arbitration Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Courts been clothed with legalese of unforseeable complexity."

EFFECT OF ARBITRATION AGREEMENT (Sec. 34)

Where the parties agree to submit their dispute to arbitration before commencing any legal proceedings, it is *prima facie* the duty of the Court to give effect to the arbitration agreement.

Sec. 34 provides that where a party to an arbitration agreement commences any legal proceedings in respect of any matter covered by the agreement, the other party to such legal proceedings may apply to the Court to stay the proceedings. If the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, it may make an order staying the proceedings.

Conditions for stay of legal proceedings. In order that a stay may be granted, the following conditions must be fulfilled :

1. There must be a *valid and subsisting arbitration agreement* capable of being enforced. The agreement must be in writing, and it must have been made before the comencement of the legal proceedings [*Ramjidas* v. *Howse*, (1908) I.L.R. Cal 199].

2. The *subject-matter* in question in the legal proceedings must be *within the scope* of the arbitration agreement, *i.e.*, the subject-matter of the arbitration must be same as the subject-matter of the legal proceeding [*Kunta Malla Reddy* v. *Soma Srinivas*, A.I.R. (1978) A.P. 289].

3. The application must be made by a *party* to the arbitration agreement or by some person claiming under him, *i.e.*, the heirs or legal representatives of the party.

4. The applicant must have take no step in the proceedings. He must make the application at the *earliest stage* of the proceedings, *i.e.*, before filing a written statement or taking any other step in the proceedings [*Anderson Wright Ltd.* v. *Moran & Co.*, A.I.R. (1955) S.C. 53].

5. The application must be made to the *judicial authority* before which the proceedings are pending.

6. The applicant must satisfy the Court that he was at the time when the proceedings commenced and is still *ready and willing* to do all things necessary for the proper conduct of the arbitration. This readiness and willingness must exist not only when application for stay is made but also at the commencement of the legal proceedings [*Food Corpn. of India* v. *Thakur Shipping* Co., A.I.R. (1975) S.C. 469].

7. The court is satisfied that there is *no sufficient reason* why the matter should not be referred to arbitration. The burden of proof is upon the party opposing stay to satisfy the Court that there is a good reason for proceeding with the action and not granting the stay. This is because when parties have agreed that their disputes are to be decided by arbitration, they are bound to

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their agreement unless there is some strong reason why they should not be bound.

Even if these conditions are fulfilled, the world *'may'* used in Sec. 34 indicates that the Court has a discretion to stay or not to stay the suit having regard to the totality of circumstances.

This discretion must, however, be exercised judicially. Thus, where an application under Sec. 34 for stay of suit is filed after the arbitration award has already been passed, the Court will not be justified in invoking its power of stay under Sec. 34 of the Act [*V. Subramanyam Raju* v. *Chandramauli Raju*, A.I.R. (1987) Ori. 33].

Staying a suit under Sec. 34 is a matter within the discretion of the Trial Court. The Appellate Court would not interfere unless the discretion *(a)* is exercised in a perverse manner, or *(b)* is vitiated by a mis-direction in law. Left to itself the Appellate Court may come to a different conclusion, but that is not a ground for interfering with the exercise of discretion by the Court below [*Printers (Mysore) Pvt. Ltd* v. *P. Joseph*, A.I.R. (1960) S.C. 1156].

Likely bias of arbitrator. An order of stay will not be granted under Sec. 34 if there is good ground for apprehending that the arbitrator will not act fairly in the matter or that is for some reason improper that he should arbitrate in the dispute between the parties [*U.P. Co-operative Federation* v. *Sunder Bros.*, A.I.R. (1967) S.C. 249]. Where an arbitration agreement provides for the appointment of an arbitrator who would most certainly tilt the scales against one party, stay will be refused [*Goverdhandas* v. *Ramchand*, A.I.R. (1918) Sindh 41]. Thus an order for stay will be refused if an arbitration clause provides for a reference to an arbitrator who is—

(a) the employee of the defendant *(e.g.,* an engineer or a worker) who would necessarily be placed in the position of both a judge and a witness [*Bristol Corpn.* v. *John Arid & Co.*, (1918) A.C. 241].

(b) a partner in the defendant's firm [*Abdul Latif* v. *Dost Mohammad*, A.I.R. (1944) All. 394].

(c) in a building contract, an Executive Engineer who has already expressed his opinion as to the execution of the work [*State of Punjab* v. *Jawaharlal & Sons*, A.I.R. (1959) Punj. 24].

MATTERS WHICH CAN BE REFERRED TO ARBITRATION

All matters in dispute between parties relating to private rights or obligations which Civil Courts may take cognizance of (Sec. 9 of the Civil Procedure Code, 1908) may be referred to arbitration, unless a reference is forbidden by a Statute or is opposed to public policy.

Some of the matters which *may be referred* to arbitration are :

(a) Determination of damages in case of breach of a contract.

(b) Question of validity of marriage or maintenance payable to wife.

(c) Question of law or of law and fact in case of separation between husband and wife.

(d) Matters of personal or private rights of the parties, *e.g.,* right to hold to the office of a priest in a temple.

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(e) Disputes regarding compliment and dignity.

(f) Time-barred claims.

The matters which *cannot be referred* to arbitration are :

(a) Matrimonial matters, *e.g.*, divorice or restitution of conjugal rights.

(b) Testamentary matters like the validity or genuineness or otherwise of a will.

(c) Insolvency matters.

(d) Matters relating to public charities and charitable trusts (Sec. 92 of the Civil Procedure Code, 1908).

(e) Matters relating to the guardianship of a minor.

(f) Lunacy proceedings.

(g) Matters of criminal nature or based on illegal transactions.

WHO CAN REFER ?

The arbitration agreement is a contract. The parties there to must be competent to enter into a contract so that they can be bound by the award of the arbitrator. To put it simply, the capacity to make a submission is co-extensive with the capacity to cantract. Conversely, he who cannot contract, cannot make a submission.

The capacity of various persons to submit disputes to arbitration is as follows :

1. A minor or a lunatic cannot refer disputes to arbitration. But a natural guardian can enter into an arbitration agreement on behalf of a minor provided it is for the benefit of the minor or reasonable and proper for the protection of the minor.

2. The manager of a joint Hindu family acting *bona fide* for the benefit of the family can submit to arbitration the partition of the joint family property.

3. An agent duly authorised has power to refer the matter in dispute to arbitration.

4. Attorneys and counsels have a general authority over the suit, the mode of conducting it, and all that is incidental to it. They have, therefore, implied authority to submit to arbitration on behalf of their clients and there is no express direction not to submit.

5. Where a person submits on behalf of himself and others jointly interested in the matter in dispute, he will be bound though the others will not be. But with an express authority, he may submit on behalf of others jointly interested.

6. A partner can refer a dispute to arbitration only when express authority is given to him by the partnership agreement or by custom or usage of trade. He has no implied authority to refer a dispute relating to the business of the firm to arbitration [Sec,19 (2) of the Indian Partnership Act, 1932].

7. A trustee can submit to arbitration.

8. An insolvent cannot submit disputes to arbitration so as to bind his estate or the Official Receiver or Assignee. But the Official Receiver or Assignee may do so with the leave of the Court.

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DIFFERENT MODES OF ARBITRATION

The Arbitration Act deals with the following three modes of arbitration :

I. Arbitration *without* the intervention of a Court (Chapter II, Secs. 3 to 19).

II. Arbitration *with* the intervention of a Court where there is no suit pending (Chapter III, Sec.20).

III. Arbitration in suits (Chapter IV, Secs. 21 to 25).

In addition to the above modes of arbitration, some Statutes provide for settlement of disputes by arbitration. Such arbitration is known as statutory arbitration (Sec. 46).

These modes are discussed in the following pages.

Statutory arbitration (Sec. 46)

There are certain Statutes which provide for settlement of disputes arising out of the provisions of those Statutes by arbitration. For example, Sec. 43 of the Co-operative Societies Act, 1912 lays down that rules made by a State Government for registered societies may provide that any dispute relating to the business of a society shall be referred to the Registrar for decision or, if he so directs, to arbitration. The Statutes providing for arbitration usually lay down the procedure of arbitration also. In the absence of any procedure laid down therein,the provisions of the Arbitration Act, 1940 apply except the following Sections :

(a) Sec. 6 which privides that an arbitration agreement will not be discharged by the death of a party thereto.

(b) Sec. 7 which deals with provisions in case of insolvency of a party to the arbitration agreement.

(c) Sec. 12 which empowers the Court to fill in a vacancy caused by the removal of an arbitrator or the revocation of his authority.

(d) Sec. 36 which empowers the Court to order that certain terms of the arbitration agreement shall cease to have any effect.

(e) Sec. 37 which provides that all the provisions of the Indian Limitation Act,1908 (now the Limitation Act, 1963) shall apply to arbitrations as they apply to proceedings in Courts.

ARBITRATION WITHOUT INTERVENTION OF A COURT
(Chapter II, Secs. 3 to 19)

In case cf arbitration without the intervention of a Court, a dispute between two or more persons is settled by reference of the dispute to an arbitrator or arbitrators by mutual agreement, *i.e.*, without the intervention of a Court. In such a case , the arbitration agreeement is deemed to include certrain provisions, unless a different intention is expressed in the agreement.

PROVISIONS IMPLIED IN AN ARBITRATION AGREEMENT

Sec. 3 provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule to the Arbitration Act, 1940. According to this Schedule, an

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arbitration agreement is deemed to include the follwing provi. ions, unless a contrary intention is expressed in it:

1. Unless otherwise expressly provided, the reference shall be to a *sole* arbitrator.

If the agreement merely provides that the dispute shall be referred to arbitration, the reference shall be made to a single arbitrator.

6. If the reference is to an even number of arbitrators, the arbitrators shall appoint an *umpire* within 1 month from the latest date of their respective appointments. Though the word used in this clause is 'shall', the clause is not mandatory.

3. The arbitrators shall make their award within *4 months after entering on the* reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

Where the arbitrators enter on the reference, the period of 4 months will count not from the date of the notice but from the date arbitrators entered on the reference [*Shambu Nath* v. *Hari Shankar Lal*, A.I.R., (1954) All. 673].

4. If the arbitrators have allowed their time to expire *without* making an award, or if they have delivered to any party to the arbitration agreement or to the umpire notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

The umpire enters on the reference only if the arbitrators inform any of the parties or the umpire by a notice in writing that they cannot agree. The notice must be given by all the arbitrators. If notice is not given by all the arbitrators, the umpire will not get jurisdiction to enter on the reference [*Kalinga Otto (Pvt.) Ltd.* v. *Charanjit Kochhar*. A.I.R. (1972) Ori. 172].

5. The umpire shall make his award within *2 months* of entering on the reference or within such extended time as the Court may allow.

If an umpire fails to make the award within the time allowed by the Court or within 2 months, as the case may be, failure of the umpire to do so may be treated by the parties as neglect or refusal to act and they may take steps to have another umpire appointed or may have the umpire removed and his substitute appointed. The Court may also set aside the reference and order that the arbitration agreement shall cease to have effect.

6. The parties to the reference and all persons claiming under them shall *submit to be examined* by the arbitrators or umpire on oath or affirmation. They shall produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, and documents within their possession or power respectively, which may be required or called for. They shall also do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

The provision that the parties shall 'do all things which the arbitrators or umpire may require' them to do is subject to the following qualifications, namely,—

(a) there is nothing in the arbitration agreement to the contrary ;

(b) a party would be entitled to claim exemption, if he is entitled to do so under the provisions of any other law for the time being in force ; and

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(c) the party is to do the required thing during the arbitration proceedings.

7. The award shall be *final and binding* on the parties and persons claiming under them respectively.

8. The *costs* of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by, whom and in what manner, such costs or any part thereof shall be paid.

If an arbitrator or umpire omits to award costs in his award, the Court may remit the award to the arbitrator or umpire for reconsideration or may make such orders as it thinks fit respecting the costs of the arbitration.

ARBITRATORS

A person who is appointed to determine differences and disputes between two or more parties by their mutual consent is called an arbitrator. He is an extra-judicial tribunal whose decision is binding on the parties. It is not enough that the parties appoint an arbitrator. The person who is so appointed must also give his consent to act as an arbitrator. His appointment is not complete till he has accepted the reference.

The arbitrator must be absolutely disinterested and impartial. It is a well-established rule of law that there should be the greatest good faith on the part of the arbitrator. Every disclosure which might in the least affect the minds of those who are proposing to submit their disputes to the arbitration of any particular individual as regards his selection and fitness for the post ought to be made so that each party may have an opportunity of conssidering whether the reference to arbitration to that particular individual should or should not be made [*Motharam Dowlatram* v. *Mayadas Dowlatram*. A.I.R. (1925) Sindh 150].

Any interest of the arbitrator either in one of the parties or in the subject-matter of reference unknown to either or the other or all the parties, as the case may be, is a disqualification for the arbitrator. Such disqualification applies only in the case of a concealed interest. If the arbitrator has an interest in the subject-matter of reference well-known to the parties before they submit to arbitration the award is good notwithstanding his own interest.

Appointment

The parties may appoint whomsoever they please to arbitrate on their dispute. They may choose an arbitrator even by a draw of lot or any other method. If they choose an incompetent or unfit person, that is their own affair. Even the judge in the case may be appointed an arbitrator. In such a case, the award given by him is not open to appeal. One of the parties to the dispute may also be appointed an arbitrator provided the other parties agree to his appointment as such.

Agreement that arbitrator be appointed by a third party (Sec. 4). The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment. For example, the parties may agree that the arbitrator shall be appointed by Mr. X or the head of a certain institution. But usually the parties themselves appoint the arbitrator or arbitrators.

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Power of Court to appoint arbitrator or umpire (Sec.8). The Court is empowered to appoint an arbitrator or umpire—

1. Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

2. Where the appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrator, as the case may be, do not fill the vacancy ; or

3. Where the parties or the arbitrators are required to appoint an umpire and do not appoint him.

Example. A ship was under charter for a voyage. The charter party provided, *inter alia*, for arbitration. A dispute arose between the shipowners and the charterers. The shipowners requested the charterers to agree on the arbitrator, but the latter refused to operate. *Held*, the dispute be settled by arbitration and an arbitrator be appointed by the Court [*Tritonia Shipping Inc.* v. *South Nelson Forest Products Corpn.*, (1966) 1 Llyod's Rep. 114].

Procedure. Any party may serve on the other parties or the arbitrators, as the case may be, a *written notice* to concur in the appointment or appointments in filling the vacancy. If the appointment is not made within 15 clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator, or arbitrators or umpire as the case may be. Such arbitrator or arbitrators shall have the power to act in the reference and to make an award as if he or they had been appointed by consent of all the parties.

Power of a party to appoint a new or sole arbitrator (Sec. 9). Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement, the following rules shall apply :

1. If either of the appointed arbitrators neglects or refuses to act or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place.

2. If one party fails to appoint an arbitrator originally or by way of substitution as aforesaid, the other party may serve on him a notice in writing to make the appointment within 15 days. In default of such appointment, the party who has appointed his arbitrator, may appoint that arbitrator to act as sole arbitrator in the reference. The award of such an arbitrator shall be binding on both parties as if he had been appointed by consent. The Court may, however, set aside the appointment of the sole arbitrator, and on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such order as it thinks fit.

If an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not, within 1 month, comply with the request, it constitutes a neglect or refusal to act.

It may be noted that Sec. 9. will come into play only if a different intention is not expressed in the arbitration agreement [*Shaw Wallace & Co.* v. *K.M. Subier & Sons*, A.I.R. (1921) Mad. 58].

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Appointment of three or more arbitrators (Sec. 10). An arbitration agreement may sometimes provide that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators. Such agreement has effect as if it provided for the appointment of an umpire by the two arbitrators appointed by the parties.

Where an arbitration agreement provides that a reference shall be to three arbitrators, the award of any two shall prevail. Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

Revocation of arbitrator's authority (Sec. 5)

The general rule is that the authority of a duly appointed arbitrator or umpire cannot be revoked. But there are two exceptions to this rule. These are as follows :

1. *The Court may grant the leave.* The Court would grant the leave to revoke the authority of a duly appointed arbitrator if *(a)* a good cause is shown, and that *(b)* a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. It must also exercise its jurisdiction in the most sparing and cautious manner, lest an agreement to refer from which all might reasonably hope for a speedy end of strife should only open the flood gates for multiple expenses and interminable delay [*Scott* v. *Van Sanden*, (1841) 1 Q.B. 102]. A very important consideration for the Court in granting the leave to revoke the authority of an arbitrator is the time when the application is made. If the application is made at an early stage of the arbitration proceedings, the Court will usually grant the leave provided there is a good cause for revocation.

The leave to revoke the authority of a duly appointed arbitrator may be granted where there is (1) excess or refusal of jurisdiction by the arbitrator : (2) legal misconduct or fraudulent conduct of the arbitrator, or where the arbitrator does not act according to the natural rules of justice ; (3) fraudulent collusion of arbitrators with a party ; (4) frustration ; (5) unreasonable delay in the conduct of the proceedings ; (6) disqualification of the arbitrator ; (7) partiality or bais.

The discretion of the Court to grant the leave to revoke the authority of the duly appointed arbitrator should be exercised within the following two limits :

(1) The Court should not lightly release the parties from their bargain. This is due to the sanctity the Court attaches to the contract.

(2) The Court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave [*Bhuwalka Bros.* v. *Fateh Chand*, A.I.R (1952) Cal. 294].

2. The arbitration agreement may specfically provide for the revocation of the authority of the arbitrator or umpire. The party who wishes to revoke the authority of a duly appointed arbitrator should submit an application to the Court for leave to revoke such authority. Notice of the filing of this application should be given to the arbitrator. It must reach the arbitrator before the award is complete in order to make the revocation complete. The Court may, on

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considering the application for leave to revoke the authority, grant or refuse the leave. The decision of the Court would depend on the facts and the circumstances of the case.

Death or insolvency of a party to the arbitration agreement

Death (Sec.6). An arbitration agreement is not discharged by the death of any party thereto either as respects the deceased or any other party thereto. In such event, the arbitration agreement is enforceable by or against the legal representative of the deceased. Also, the authority of an arbitrator is not revoked by the death of the party who appointed him.

The provisions of Sec. 6 do not affect the operation of any law by virtue of which any right of action is extinguished by the death of a person. If right to sue does not survive, the arbitration agreement will be revoked and if reference has already been made, the arbitration proceeding will come to an end.

The object of Sec. 6 is to keep an arbitration agreement alive even after the death of a party to the agreement. This means that the arbitration agreement is not discharged by the death of any party thereto. After the death of a party to the agreement, in all cases (other than those in which the right of action is extinguished by his death) the agreement is enforceable by or against his legal representatives. Whether a legal representative of the deceased party is or is not bound by, or entitled to enforce, the contract to refer to arbitration, depends upon the nature of the right which forms the subject-matter of the reference, *i.e.*, upon the question whether the right is purely personal or survives to the legal representative.

In the case of the following rights, right of action is extinguished on the death of a party, namely, *(a)* Right of pre-emption. *(b)* Right of damages for defamation. *(c)* Right of malicious prosecution. *(d)* Right of office. *(e)* Right of action based on a tort. (f) Suit for injunction.

Insolvency (Sec. 7). A contract entered into by a person who is subsequently declared insolvent might contrain an arbitration clause. If the Official Receiver or Assignee adopts the contract, which he will do if it is beneficial to the insolvent's estate, such clause is enforceable by or against him.

A person who has been adjudged an insolvent may have, before the commencement of the insolvency proceedings, become a party to an arbitration agreement. If any matter to which the agreement applies is required to be determined in connection with, or for the purposes of the insolvency proceedings, any other party to the agreement or the Official Receiver or Assignee may apply to the Court (having jurisdiction in the insolvency proceedings) for direction that the matter in question shall be referred to arbitration in accordance with the agreement. In such a case, the Court may, if it is of opinion that having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Removal of arbitrators or umpire by Court (Sec. 11)

The Court may, on the application of any party to a reference, remove an arbitrator or umpire in the following two cases :

1. *If the arbitrator or umpire fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.* 'Dispatch' means

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rapid performance or prompt settlement. The arbitrators have to make their award within 4 months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. The umpire has to make his award within 2 months of entering on the reference or within such extended time as the Court may allow.

When an arbitrator does not use reasonable 'dispatch', *e.g.*, where he needlessly prolongs the proceedings, the Court may remove him. If the arbitrators or the umpire fail to make the award within the time limit prescribed, the Court may remove them.

2. *If the arbitrator or umpire has misconducted himself or the proceedings.* The word 'misconduct' implies not only moral turpitude but also includes legal misconduct in the proceedings.

Removal on the ground of moral turpitude. This would take place on grounds of corruption and fraud, partiality and bias [*C.V. Krishna* v. *State of Madras*, A.I.R. (1977) Mad. 3). and personal disqualification, etc.

Removal on the ground of leagl miscoduct. Legal miscoaduct means any neglect of the duty and responsibility by the arbitrator which results in miscarriage of jusctic. An arbitrator or umpire may be removed on this ground—

(1) where the arbitrator or umpire, without the consent of the parties, insists that a person not connected with arbitration proceedings should give evidence ;

(2) where a material piece of evidence is tendered and rejected ;

(3) where the arbitrator is partial ;

(4) where the arbitrator, through the proceedings, shows bias against the applicant ;

(5) where the arbitrator has improperly refused to grant the necessary adjournment to the parties ;

(6) where the arbitrator has refused to hear evidence within the scope of the reference ;

(7) where the applicant has discovered subsequent to the reference that the arbitrator or umpire has a secret interest in the subject-matter of the reference ;

(8) when there is unreasonable delay on the part of the arbitrators or umpire it making the award ; and

(9) when the arbitrator or umpire is otherwise disqualified to act.

The grounds for the removal of the arbitrator or umpire are also sufficient for setting aside the award.

Where an arbitrator or umpire is removed, he shall not be entitled to receive any remuneration in respect of services rendered by him.

For the purposes of Sec. 11, the expression 'proceeding with the reference' includes, in case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

Power of Court where an arbitrator is removed or his authority is revoked (Sec. 12). Where the Court removes an umpire who has not entered

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on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

A person appointed under Sec. 12 as an arbitrator or umpire has the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

Powers of arbitrators and umpire (Sec. 13)

The arbitrators or umpire shall, unless a different intention is expressed in the arbitration agreement, have the following powers :

1. *Power to administer oath to parties and witnesses.* The power of the arbitrators or umpire to administer oath to the parties and their witnesses is discretionary and not mandatory. If the arbitration agreement expressly requires that the parties and witnesses should be examined on oath, such requirement must be observed unless this formality is dispensed with by the consent of the parties.

2. *Power to state a special case for the opinion of the Court.* Unless a different intention is expressed in the arbitration agreement, the arbitrators or the umpire have power—

(a) to state a special case for the opinion of the Court on a question of law involved, or

(b) to state award wholly or in part in the form of a special case for the opinion of the Court.

3. *Power to make the award conditional or in the alternative.* A conditional award is not final or certain. It becomes good if there is an alternative award also which would hold good if the condition is not fulfilled. But a conditional award is not necessarily uncertain if the condition is capable of being performed.

4. *Power to correct clerical mistakes or errors in award.* Once an award is made, the power of the arbitrators or umpire is at an end. They can then make no corrections or alterations in the award. They are *functus officio* [*Juggilal Kamlapat* v. *General Fibre Dealers Ltd.*, A.I.R. (1962) S.C 1123]. They can, however, make alterations in the award to correct—

(a) any clerical mistake, or

(b) any error arising from any accidental slip or omission or any error which is apparent on the face of the award.

Mistakes or errors of any other kind can be corrected only if the award is remitted to the arbitrators for reconsideration and not otherwise.

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5. *Power to administer to the parties necessary interrogatories.* The arbitrators or umpire can order any party to the arbitration to answer such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

6. *Power to extend time for making award.* The arbitrators or umpire can extend the time for making the award without the consent of the Court if—

(a) all the parties to the arbitration agreement consent, and

(b) there is provision to this effect in the arbitration agreement

If the above conditions are satisfied, the extension of time can be made only before the time originally fixed for making the award has expired [*Co-operative Hindustan Bank* v. *Bholanath*, 19 C.W.N. 165].

7. *Other powers.* It has been held in various decided cases that the arbitrators or umpire have the power to *(a)* order specific performance of a contract under certain restrictions, *(b)* order dissolution of partnership, *(c)* award interest, *(d)* fix times of payment, *(e)* award costs, *(f)* determine the question of heirs or legal representatives of a deceased party to the arbitration agreement, *(g)* construe the contract to determine the actual parties to the contract, *(h)* award costs of the reference and award.

But the arbitrators or umpire do not have the power to —

(a) alter the terms of the arbitration agreement, *(b)* determine validity of agreement, *(c)* alter the course of legal devolution, *(d)* make *ex gratia* payment, *(e)* extend the date of delivery, *(f)* award damages otherwise than according to law.

Duties of arbitrators and umpire

First duties. After receiving notice of appointment, the arbitrator should see that his appointment is in order. In case his appointment is not in order, he should have put his appointment in order before he proceeds with the arbitration. Then as soon as the proceedings begin he should satisfy himself that the disputes which he deals with are within the terms of the submission so that his award may not be vitiated for want of jurisdiction.

The other duties of an arbitrator (and also umpire) are as follows :

1. He shall, with all reasonable dispatch, enter on the reference and make an award within the prescribed time.

2. He shall act judicially and impartially. He shall not secretly communicate with any party or the party who has appointed him. He shall give a fair hearimg to the parties and a reasonable time and opportunity to them to substantiate their respective claims [*Shambju Dyal* v. *Basdeo Sahai*, A.I.R. (1970) All. 525].

3. He shall stand indifferent between the parties and shall have no interest direct or remote in the subject-matter of the dispute or in the parties.

4. He shall not misconduct himself or the proceedings in any way, *e.g.*, by accepting improper gratification or bribe from a party or by showing bias or partiality towards a party.

5. He shall not exceed his authority and shall act within the scope of the arbitration agreement. Thus, where an arbitrator has to decide whether a buyer has the right to reject goods as inferior in quality, and he awards that the buyer should take them with an allowance, or where he has to decide as

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to the boundaries of certain land, and he decides as to title, he acts in excess of his authority.

6. He shall follow the principles of natural justice in conducting the arbitration proceedings. He shall act together with other arbitrators in case there are any. He shall also be present at every meeting of the arbitrators and examine the witnesses and parties in the presence of all other arbitrators.

7. He shall give a final award on all the matters referred to him, unless he is empowered to make several awards. He shall also sign and file the award within due time.

Remuneration of arbitrators

The remuneration of arbitrator or umpire is fixed by parties before the commencement of the arbitration proceedings. If they fail to do so, the arbitrator or umpire is entitled to a reasonable remuneration, as determined by the Court.

Dispute as to remuneration (Sec. 38). Sometimes the arbitrator or umpire may demand an unreasonably large sum as his remuneration and refuse to deliver his award except on payment of the fees demanded by him. In such a case, the Court may, on the application of any party in this behalf, order the arbitrator or umpire to deliver the award to the applicant on payment into the Court by the applicant of the fees demanded the arbitrator or umpire. The Court shall then, after such inquiry, if any, as it thinks fit, determine the reasonable amount to be paid to the arbitrator or umpire as his remuneration and shall refund the balance of the money, if any, to the applicant.

The application may be made by any party to the reference unless the fees demanded have been fixed by written agreement by him and the arbitrator or umpire. Further, the arbitrator or umpire shall be entitled to appear and be head on such application.

Dispute as to costs. The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

AWARD

Award means an arbitration award [Sec. 2 *(b)*]. It is a judgment or final determination of the arbitrators or an umpire on all matters referred to them. It is in fact a final adjudication by a tribunal of the parties' own choice. It is binding in the same manner as the decision of a Law Court. The document containing the decision of the arbitrators or umpire is also called *award.*

The general principle is that an award is final and an arbitrator is not bound to give reasons for his award ; and assuming that it is good on the face of it there can be no appeal from it [*Dinn* v. *Blake*, (1875) L.R. 10 C.P. 301].

The award need not be a reasoned judicial decision as the arbitrator is not bound to give reasons at all in the award. He need not record separate findings on various points on which the parties are at difference. As such, all that he is required to do is to give an intelligible decision which determines the rights of the parties in relation to the subject-matter under reference.

An award must be read as a whole. Some portion or portions of the award cannot be picked up to show that the findings of the arbitrators are inconsis-

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tent with that portion or those portions. The general rule in case of contracts is that when a contract is susceptible of two constructions, one of which renders the contract valid and the other invalid, the former construction will be adopted. This rule applies to the construction of awards also. The Court leans towards the construction that the award *prima facie* is certain. The Supreme Court in *Nachiappa* v. *Subramaniam*, A.I.R. (1960) S.C. 307 observed that in appreciating the effect of the words used in the award given by the arbitrators, the Court must bear in mind that the arbitrators are laymen not familiar with the technical significance of legal expressions, and so the Court must read the relevant clauses in the award as a whole with a view to determine what in effect and substance they intended to decide.

Essentials of a valid award

1. *It must be made in writing.* It may be in such form and expressed in such language as the arbitrators or umpire think fit.

2. *It must follow the agreement and not purport to decide matters not within the agreement.* An award on something outside the agreement is void and if the void part cannot be severed from the rest of the award, the whole award is void.

3. *It must be final and give a decision on all matters referred.* An arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. He is not bound to determine a matter not notified to him as a matter of difference or which is merely a collateral question, though it may be necessary to dispose it of with a view to deciding the main dispute. An award going beyond the subject-matter referred for arbitration is invalid [*Union of India* v. *Prem Chand*, A.I.R. (1961) Pat. 201].

4. *It must be certain*,. The award must be certain, consistent, reasonable and possible of performance so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties. An award that *A* or *B* shall do a certain act is void for uncertainty [*Lawrence* v. *Hodgson*, (1926) 1 Y & J 16]. If *prima facie* the award is good, it is for the defendant to show that it is uncertain [*Union of India* v. *T.N. Misra*, A.I.R. (1970) S.C. 753].

5. *It must be dated and signed* by all the arbitrators and generally at the same time and in the presence of each other. However note the observation made by the Supreme Court in *State of West Bengal* v. *Sree Sree M.A. Engg.*, A.I.R. (1987) S.C. 2229 :

> "It is true that an unsigned award cannot be made the rule of the Court. But it is only a formal defect. It appears that the award was handed over to the parties and a letter was sent to the parties concerned and award bore no signature of the arbitrator. The parties had acted upon the award. It is true that under the law the mandatory rule is that the award should be signed by the arbitrator. But law must subserve justice and endeavour to serve the purpose of law. The Court can in such circumstances extend time for making the award and direct curing of the formal defect in the award. So much time and effort should not be allowed to go waste'."

6. *If must be legal* and must be in conformity with the powers contained in the submission.

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Award as intrument of offence and defence

An award is regarded as an *instrument of offence* in the sense that the party in whose favour it is made is entitled to have the Court's judgment in terms of the award. Upon the judgment so pronounced a decree follows. No appeal lies from this decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

An award also operates as an *instrument of defence.* If it is lawfully made, it can be pleaded in any suit as a defence to any claim which is inconsistent with it. It is final upon matters covered by it, unless it is set aside or remitted for reconsideration. In that sense it operates as *res judicata, i.e.,* it is final determination of the dispute or difference between the parties to arbitration. The party aggrieved by the award where the decree follows cannot subsequently agitate the same question in a subsequent suit.

Award to be signed and filed (Sec. 14)

When the arbitrators or umpire have made their award, they shall sign it and give notice in writing to the parties of the making and signing of the award and of the amount of fees and charges payable in respect of the arbitration award. If the award is acted upon to by the parties, the dispute is settled, and the award need not be filed in the Court to make it a rule of the Court. However, if the arbitrators or umpire are requested by any party to the arbitration agreement, or if they are so directed by the Court, they shall file the award or a signed copy of it in the Court, together with all depositions and documents which may have been taken and proved before them. They shall however do so upon payment of the fees and charges due in respect of the arbitration and award and the costs and charges of filing the award. When the award is filed in the Court, the Court shall give notice to the parties of the filing of the award.

Notice to the parties to intimate to them of the filing of the award in the Court is *mandatory.* If there is non-compliance with this statutory requirement and an order is passed by the Court making the award a rule of law, the order is liable to be set aside. The parties are entitled to notice of the date of filing of the award even if they had knowledge of the date on which the award was filed, and the omission to give such notice is a material irregularity and if the decree is passed upon the award wihout giving such notice, the decree is liable to be set aside in the revision [*Gurudita Mal* v. *Basantmal Pannalal,* A.I.R. (1925) Lah. 619]. The object of a notice of the making and signing of the award is to apprise the parties to the arbitration agreement, of the fact of making of the award so as to enable them to prefer objections before the Court at proper time.

If only a portion of the award is valid and separable from the rest of the award, only valid part can be made the rule of Court [*Metro Electric Co.* v. *Delhi Development Authority,* A.I.R. (1976) Delhi 195].

Where the arbitrators or umpire state/states a special case for the opinion of the Court on a question of law involved, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, shall form part of, the award.

Jurisdiction of Court (Sec. 31)

An award is to be filed in any Court having jusdiction in the matter to which the reference relates. All questions regarding the validity, effect or

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existence of an award or arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award under the agreement has been and by no other Court.

Judgment in terms of award (Sec. 17)

Where the award is valid, the Court pronounces judgment in terms of the award. It does so where it sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, and the time of 30 days for making an application to set aside the award has expired. Upon the judgment so pronounced a decree follows.

The decree can be enforced in the manner provided by the Code of Civil Procedure, 1908 for the execution of decrees. The decree pronounced according to the award is final. No appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance, with the award.

After the award has been filed, Sec. 17 gives an opportunity to the party challenging or disputing the award to file an application to set aside the award, within the period of limitation. The party in whose favour the award is made is entitled to a decree on the basis of the award, *(a)* if no application is filed, or *(b)* if it is filed, it is dimissed on merit. When an application to set aside an award is made in time and it succeeds, the party in whose favour the award is made is not entitled to a decree in terms of the award.[1]

Power of Court to pass interim orders (Sec. 18)

At any time after the filing of the award, whether notice of the filing has been served or not, the Court may pass such interim orders as it deems necessary upon being satisfied by affidavit or otherwise—

(a) that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or

(b) that speedy execution of the award is just and necessary.

Any person against whom such interim orders have been passed may show cause against such orders and the Court after hearing the parties, may pass such further orders as it deems necessary and just.

MODIFICATION, RECONSIDERATION AND SETTING ASIDE OF AN AWARD

It is well settled that when parties appoint an arbitrator as a sole and final judge of any dispute between them, they bind themselves as a rule to accept the award as final and conclusive. Such an award is not ordinarily liable to be set aside on the ground that either in facts or in law it is erronerous. The award can, of course, be corrected, modified or set aside only under the limited scope of the provisions made under Secs. 15, 16 and 30 of the Act.

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1. The period of limitation of the filing of an award in Court is 30 days from the date of service of the notice of the making of the award. The period of limitation for setting aside an award or getting an award remitted for reconsideration is also 30 days from the date or service of the notice of the filling of the award (Article 119 of the Schedule to the Limitation Act, 1963).

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Modification or correction of award (Sec 15)

This may be dicussed under the following two heads :

1. *Modification or correction of an award by the arbitrators or the umpire.* Once an award is made by the arbitrators or umpire, they become *functus officio.* They have no power to make any modifications or corrections in the award even though the award might have been made due to oversight, accident or slip. They can, howsoever, modify an award in two cases, *viz.*,

(1) When there is a clerical mistake in the award (Sec. 13 *(d)*].

(2) When the award is remitted to them under Sec. 16 for reconsideration.

Except these two cases, the power to modify an award lies only with the Court.

1. *Modification or correction of an award by the Court* (Sec. 15). The Court may by order modify or correct an award in the following cases :

(2) *Award upon a matter not referred to arbitration.* The Court may modify the award if—

(i) a part of the award is upon a matter not referred to arbitration.

(ii) such part can be separated from the rest of the award, and

(iii) it does not affect the decision on the matter referred to arbitration.

If a part of the award is objectionable and not separable from the rest, the whole award is void.

(2) *Award imperfect in form or containing an obvious error.* Where the award is imperfect in form or there is some obvious error in it, the Court may modify or correct it. When, for example, the award is obviously in favour of the plaintiff but by mistake the word defendant is written, the award may be modified or corrected. But if the award is indefinite or uncertain so that it is incapable of execution, it may be set aside.

(3) Clerical mistakes or errors arising from accidental slip or omission. Mistakes in an award may be of three kinds :

(i) clerical mistakes.

(ii) mistakes not apparent on the face of the award, and

(iii) mistakes apparent on the face of the award.

The power of the Court to correct the award is restricted to accidental slips or omissions or clerical mistakes.

As regards mistakes not apparent on the face of the award, the award is good notwithstanding the mistakes and the Court cannot interfere with the award [*State* v. *Pioneer Construction Co.*, A.I.R. (1978) A.P. 281]. Where, for example, an arbitrator makes a mistake of law or fact, the award is good provided such mistake does not appear on the face of the award [*Tapan Kumar* v. *Krishna Kanta*, A.I.R. (1980) Cal 28].

As regards mistakes apparent on the face of the award, the award cannot be corrected. It may, in such a case, be remitted to the arbitrator for reconsideration or it may be set aside. In *Union of India v. A L. Rallia Ram*, A.I.R. (1983) S.C. 1685, the Supreme Court reiterated :

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"The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the aritration agreement. But it is now firmly established that an award is bad on the ground of law on the face of it when in the award itself or in a document actually incorporated in it there is found some legal proposition which is the basis of the award and which is erroneous."

The aggrieved party can file an appeal on the order modifying or correcting the award to the Court authorised by law to hear appeals from orginal decrees of the Court passing the order. But no second appeal shall lie from an order passed in such appeal except an appeal to the Supreme Court.

Award remitted for reconsideration (Sec. 16)

The Court may from time to time remit the award or any matters referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit. It may do so —

1. *Where the award leaves some matter undetermined or determines some matter not referred to arbitration*, and such matter cannot be separated from the other matters. The matter left undetermined must be some definite and substantial matter and the parties must have some difference over it. If any matter is left undetermined by the arbitrator, the Court can only remit the award for reconsideration. It cannot itself fill the gap. But an award will not be remitted to the arbitrator for reconsideration if the matter left undetermined was not notified to the arbitrator as a matter of difference.

2. *Where the award is indefinite.* Where the award is in any way uncertain, indefinite or doubtful as to be incapable of execution, it may either be remitted to the arbitrator for reconsideration or may be set aside.

3. *Where an objection to the legality of the award is apparent upon the face of it.* An erroneous decision by the arbitrator will vitiate the award provided the objection to the legality of the award is apparent upon the face of it or in any document incorporated in the award [*Exceutive Engineer, Ganjam* v. *Sanker*, A.I.R. (1978) Ori. 121]. In such a case, the Court may remit the award to the arbitrator for reconsideration or may set it aside.

In various decided cases, the following other grounds for remitting the award for reconsideration have been laid down :

(1) where there has been an admitted mistake and the arbitrator himself asks that the matter may be remitted ;

(2) where there has been misconduct on the part of the arbitrator ;

(3) where additional evidence has been discovered after the making of the award.

When does an award become void ? Where an award is remitted to the arbitrator or umpire for reconsideration, the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court. The Court may by subsequent order extend this time. If the arbitrator or umpire fails to reconsider the award and submit his decision within the time fixed, the award shall become void.

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What happens when an award becomes void ? When an award has become void or has been set aside, the Court may by order supersede the reference. It shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred (Sec. 19)

Setting aside award by Court (Sec. 30)

Under the Law an arbitrator is made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts [*Hindustan Tea Co.* v. *K. Sashikant & Co.*, A.I.R. (1987) S.C. 81]. In *Allen Berry & Co. (Pvt.) Ltd.* v. *Union of India*, A.I.R (1971) S.C. 696 the Supreme Court has held that the rule is that as the parties choose their own arbitrator to be the judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon law or facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake. But if the award goes beyond the agreement and is illegal on the face of it, it will be set aside [*Metro Electric Co.* v. *Delhi Development Authority*, A.I.R (1976) Delhi 195].

The Court can set aside an award on one or more of the following grounds, naamely, —

1. *If the arbitrator or umpire has misconducted himself.* This would cover the following cases :

(1) *Where he is guilty of moral turpitude.* Under this head fall cases of corruption and fraud or other malpractices on the part of the arbitrator or umpire as, for example,

(i) taking improper gratification from a party, or

(ii) bias or partiality towards a party, if proved.

In *Asiatic Salvors* v. *Dodsal Private Ltd.*, A.I.R. (1987) Bom. 335, petitioners filed a petition in the Court for setting aside the award of an arbitrator on the ground of bias by the arbitrator. The petitioners were aware of the alleged bias some months prior to commencement of arbitration. Though they did not actually participate in the arbitration proceedings, they allowed arbitration to continue and culminate in an award by the arbitrator. *Held*, the petitioners could not be allowed to raise objection and as such the award could not be set aside on the ground of bias at such a late stage.

In *Ramsahai Sheduram* v. *Harishchandra Dullachandji*, A.I.R. (1963) M.P. 143, the Court also held that if a party discovers that the arbitrator suffers from a personal disqualification which the party could not have ascertained with due diligence at the time of the reference, the party must take immediate steps to stop arbitration. If the party fails to go to Court for revocation of reference and takes part in the arbitration proceedings, he cannot later on challenge the award on that ground.

(2) *Where he is guily of partiality.* Partiality shall have to be strictly proved. The general rule is that if the parties with full knowledge of the facts select an

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arbitrator who is not an impartial person or who has to perform other duties which will not permit of his being an impartial person in the ordinary sense of the word, the Court will not release them from the bargain upon which they have agrred.

(3) *Where he has, or acquires, an interest in the subject-matter unknown to the parties.* Where the arbitrator is disqualified from acting on the ground that unknown to one of the parties he had a secret interest or acquires an interest in the subject-matter of the arbitration agreement or reference, the Court can set aside the award on the ground of his misconduct. Likewise an award may be set aside if the arbitrator was indebted to one of the parties at the time of the award and the other party did not know about it [*Venkatachallam* v. *Suryanaraina*, A.I.R. (1941) Mad. 129].

(4) *Where there is legal misconduct on his part.* Misconduct not amounting to moral turpitude is called legal misconduct. It refers to the conduct of the arbitrator which is so substantially unfair that the Court will not allow the award to be valid and binding. It includes failure to perform the essential duties which are cast on the arbitrator as such. Again, any irregularity or action which is not consistent with the general principles of equity and good conscience which ought to govern his conduct is legal misconduct.

Legal miscounduct includes, for example, the following :

(a) assessing damages at black market price ;

(b) basing a finding on no evidence or without any material or record ;

(c) refusing to record evidence when tendered where evidence is required ;

(d) asking for information from third parties without the knowledge or consent of the parties concerned ;

(d) failure to act impartially ; and

(f) acceptance of hospitality of one of the parties, such hospitality being offered with the intention of influencing the arbitrator's decision. But the mere fact that the arbitrator dined with a party to the dispute while the other was absent does not raise the presumption of misconduct [*Mosely* v. *Simpson*, (1873) L.R. 16 Eq. 226].

2. *If the arbitrator or umpire has misconducted the proceedings.* The words 'misconducted the proceedings' mean "such a mishandling of the arbitration as is likely to cause some substantial miscarriage of justice" e.g., where the arbitrator refuses to hear evidence upon a material issue or where the arbitrator makes no effort to procure vital documents and gives an award without considering such documents [*Bombay Ammonia (Pvt.) Ltd* v. *Union of India*, A.I.R. (1987) Delhi 148].

It is a well-settled priniciple that an arbitrator is not bound to record his reasons or state the principles of law on which he had proceeded, and that it is only when the arbitrator proceeds to give his reasons or to lay down the principles on which he has arrived at his decision that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award. [*Bungo Steel Furniture (Pvt.) Ltd.* v. *Union of India*, A.I.R. (1967) S.C.

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3. *If an award is made after the issue of an order of the Court superseding the arbitration.* If an order is made superseding the arbitration, the arbitrator becomes *functus officio* and has no power to make any award. If he does so, the award may be set aside by the Court. If the award is not set aside, it becomes final [*Pottu Kumari* v. *Upendranath*, A.I.R. (1919) Pat. 93].

4. *If award is made after the arbitration proceedings have become invalid.* If an order under Sec. 35 is made staying the arbitration proceedings, the arbitrator becomes *functus officio* and he has no power to make any award provided a notice thereof has given to him. An award made after such notice is void and the Court may set it aside.

5. *If the award is improperly procured or is otherwise invalid.* A party may be guilty of fraudulent concealment of any matter which he ought to have disclosed. It may also be guilty of wilfully misleading or deceiving the arbitrator or umpire. If in these cases the party has obtained an award, it is improperly procured and shall be set aside. This also covers cases of awards procured by corruption, fraud or undue influence. An award is placed on the same footing as a contract. Every kind of fraud, if proved, will vitiate an award in the same way as a contract would be vitiated.

Likewise an award which is the product of non-application of the mind of the arbitrator cannot be permitted to be sustained in law, since this would come within the expression ' otherwise invalid' used in Sec. 30 [*Bombay Ammonia (Pvt.) Ltd.* v. *Union of India*, A.I.R. (1987) Delhi 148].

Where an award is good in part and bad in part, and the two parts are severable, the award can be set aside in part [*Mehta Teja Singh & Co.* v. Union of India, A.I.R. (1977) Delhi 231].

Procedure for setting aside an award. If any party to an arbitration agreement or any person claiming under him desires that the award should be set aside, he must apply to the Court in which the award has been filed. The application must be made within a period of 30 days from the date of the service of the notice of the filing of the award. If no such application is made, the award cannot be set aside on any of the grounds specified in Sec. 30.

The application for setting aside the award may be resisted where the applicant—

(1) has acquiesced (assented) in irregularities by not applying to the Court to set aside the award at the right moment, even though he had the full chance to object, and has clear knowledge of the circumstances ;

(2) has accepted benefit under the award with full knowledge of all relevant facts and circumstances affecting the case ;

(3) has not been in any way prejudiced by the act or irregularity of the arbitrator ; and

(4) does not apply for setting aside the award within 30 days from the date of the service of the notice of the filing of the award.

Personal knowledge of arbitrator

An arbitrator, as a rule, must not decide matters on his own personal knowledge. If he does that, the award will be bad in law and may be set aside. He can use his personal knowledge if the parties expressly consent to it or if he is selected for his personal skill and knowledge of the matter in dispute. In

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such a case, the award cannot be set aside on the ground that the arbitrator decides from his own personal knowledge. It would, however, be desirable that he should tell the parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views [*Daulat Singh* v. *Ratna*, A.I.R. (1926) Bom. 527].

An expert arbitrator who is appointed on account of his skill, experience and knowledge of trade stands on a different footing. He has a right to make use of his own expert knowledge as to the usage of trade or profession in order to be guided in determining the question referred to him [*Mediterranean Co.* v. *Fortress Fabrics*, (1948) 2 All E.R. 186]. Indeed everyday practice tells us that in many important commercial matters, such as in the sale of goods by sample, the whole benefit of referring a dispute to an expert arbitrator would be almost nullified if it was essential for him to decide the case solely by the evidence of witnesses called on one side or the other as to comparison between the goods tendered and the sample.

To determine whether an arbitrator can impart his own personal knowledge into consideration of the case before him, we shall have to depend upon the terms of the reference to arbitration.

POWERS OF THE COURT IN RELATION TO ARBITRATION PROCEEDINGS

The various powers of the Court in relation to arbitration proceedings are as follows :

1. It can give *leave to* a party to revoke the authority of the arbitrator appointed by him (Sec. 5).

2. It can *appoint* an arbitrator or umpire in certain cases (Sec. 8).

3. It can *set aside* the appointment of a sole arbitrator by any party (Sec. 9).

4. It can *remove* the arbitrators or the umpire and appoint other persons in their or his place or appoint some person as the sole arbitrator (Secs. 11 and 12).

5. It can *pronounce its opinion* when special case is stated by an arbitrator (Secs. 13 and 14).

6. It can have the award *filed* under Sec. 14.

7. It can *modify* or *correct* an award (Sec. 15).

8. It can *remit* an award to the arbitrators or umpire for reconsideration (Sec. 16).

9. It can *extend the time* for the submission of an award (Sec. 28).

10. It can *pass judgment* in terms of the award and thereupon issue a decree which is capable of execution (Sec. 17).

11. It can pass such *interim orders* as it deems necessary, in order to counteract any action designed to defeat, delay or obstruct the execution of any decree that may be passed upon the award (Secs. 18 and 41).

12. It can *supersede* the arbitration agreement where an award has become void or has been set aside. It shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred (Sec. 19).

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13. It can *enlarge*, from time to time, the time for making an award (Sec. 28).

14. It may, where and in so far as an award is for the payment of money, order in the decree, *interest*, from the date of the decree at such rate as it deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree (Sec. 29).

15. It can *set aside* an award on one or more of the grounds specified in Sec. 30.

16. It can *stay* any suit or legal proceedings relating to a matter which is covered by a valid arbitration (Sec. 34).

17. It can decide disputes as to arbitrator's *remuneration* and costs (Sec. 38).

18. It can issue *processes* for the appearance of witnesses before arbitrator.

It can also punish the parties or witnesses if they fail to give evidence or are guilty of any contempt (Sec. 43).

Powers of Court under Schedule II. (1) It can pass any *interim order* for the preservation, interim custody or sale of any goods which are the subject-matter of the reference.

(2) It can *pass suitable order* for securing the amount in difference in the reference.

(3) It can *pass orders* for the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise. Further, it can pass orders authorising for any of these purposes any person to enter upon or into any land or building in the possession of any party to the reference. It can also pass orders authorising any samples to be taken, or any observation to be made, or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

(4) It can *issue interim injunction* for the appointment of a receiver.

(5) It can *pass orders* for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

Court's power to supersede arbitration

The Court has the power to supersede arbitration in the following cases :

1. The Court has power to order that the arbitration agreement shall cease to have effect with reference to the difference referred—

(a) where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court ; or

(b) where the Court removes an umpire who has entered on the reference ; or

(c) where the Court removes a sole arbitrator or arbitrators.

2. The Court may by order supersede the arbitration agreement —

(a) where an award has become void ; or

(b) where an award has been set aside.

On such supersession, the Court shall order that the arbitration agreement shall cease to have effect with respect to the difference referred.

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3. In any of the circumstances mentioned in Sec. 8 (which deals with the power of the Court to appoint an arbitrator or arbitrators or umpire), Sec. 10 (which deals with provisions as to appointment of three or more arbitrators), Sec. 11 (dealing with the power of the Court to remove arbitrators or umpire) and Sec. 12, the Court may, instead of filling up the vacancies or making the appointments, make an order supreseding the arbitration and proceed with the suit.

4. In addition to the above three cases mentioned in the Arbitration Act, the Court has inherent jurisdiction to intervene and supersede arbitration if the case falls under Sec. 151 of the Code of Civil Procedure, 1908 when such an order is urgently necessary for the ends of justice and to prevent an irreparable injury to the party or to prevent abuse of the process of the Court [*Bhola Nath* v. *Raghunath*, A.I.R. (1929) All. 743].

ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING

(Chapter III, Sec. 20)

Parties to an arbitration agreement are given an option of proceeding with arbitration indepently of a Court, *i.e.*, without the intervention of a Court in the manner as already discussed. Alternatively, they may proceed with arbitration under the supervision of a Court where there is no suit pending. Sec. 20 allows the parties or any of them to initiate arbitration proceedings under the supervision of a Court. This affords a party an opportunity—

(a) of getting the Court's recognition of the arbitration agreement at an early stage,

(b) of clearing away all possible objections to the agreement to refer before going to arbitration, and

(c) to put an end to the dilatory tactics adopted by a party by disputing the existence or validity of an arbitration agreement or by refusing to nominate an arbitrator.

The provisions of Sec. 20 are discussed below :

1. *Application to file the arbitration agreement in the Court.* Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any one of them may apply to the Court that the agreement be filed in the Court. The Court to which the application is made should have jurisdiction in the matter to which the agreement relates.

The above provision may be analysed as follows :

(a) The parties must have entered into a valid written arbitration agreement. The agreement must have been entered into before the institution of any suit with respect to the subject-matter of the agreement or any part of it.

(b) A difference contemplated in the agreement must have arisen. Before a reference is made under Sec. 20, the existence of a dispute is essential. If there is no dispute, the entire proceeding, including the award and a decree passed thereon, if any, would be null and void [*Chief Administrator* v. *Prabartak Commercial Corpn.*, A.I.R. (1975) M.P. 152].

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(c) The arbitrators should not have started the proceedings and the award should not have been made. Sec. 20 relates to a stage prior to the award, *i.e.*, to an application to file the arbitration agreement in the Court and to proceed to arbitration with the intervention of the Court.

(d) The Court to which the application is made should have the jurisdiction in the matter to which the arbitration agreement relates.

2. *Application to be in writing.* The application (that the agreement be filed in the Court) shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested. The applicant shall be the plaintiff and the contending parties to the agreement shall be the defendants. If the application is by the consent of all the partices, the party interested or claiming to be interested shall be the plaintiff and the other parties shall be the defendants.

3. *Issue of notice by the Court.* On such application being made, the Court shall issue notice thereof to all the parties to the agreement (other than the applicants) requiring them to show cause within the time specified in the notice why the agreement should not be filed.

4. *Order of the Court.* Where no *sufficient cause* is shown, the Court shall order the agreement to be filed. It shall then make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise. Where the parties cannot agree upon an arbitrator, the Court shall make an order of reference to an arbitrator appointed by the Court itself.

The words 'sufficient cause' cover all grounds of justice, equity and good conscience on which a Court thinks an agreement should not be filed. These words are not confined within the narrow compass of fraud, coercion and undue influence. There are other causes besides these which may be sufficient to entitle a Court to refuse to allow the agreement to be filed [*Amritsar Improvement Trust* v. *Waryam Singh*, A.I.R. (1955) NUC (Punj.) 539].

The following have been held to be sufficient causes within the meaning of Sec. 20 :

(1) Misrepresentation, fraud or mistake [*Ganesh* v. *Keshodas*, A.I.R. (1919) Lah. 140].

(2) Conduct of the parties showing that they have abandoned the agreement [*Madho Kashi Nath* v. *Sambasiva*, A.I.R. (1920) Nag. 29].

(3) The fact that the arbitrator is a relation of one of the parties and the fact was not known to the other party [*Motharam Dowlatram* v. *Mayadas Dowlatram*, A.I.R. (1925) Sindh 150].

(4) Delay in making an application showing that the parties had abandoned the agreement [*Secretary of State* v. *Balwant*, A.I.R. (1933) Lah. 18].

(5) Personal incompetency in the shape of minority, idiocy, lunacy of a person entering into an agreement and want of confidence of the parties in the arbitrator [*Girdhari Lal* v. *Gobardhan Dass*, A.I.R. (1937) Oudh 435].

(6) Want of mutuality [*Nagathazen* v. *Nagakyaw*, 38 I.C. 577].

There is no period of limitation prescribed either in the Arbitration Act, 1940 or the Limitation Act, 1963 for filing of applications under Sec. 20 of the Arbitration Act. The period of 3 years prescribed in Article 137 of the Limitation

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Act, 1963 might be applicable to an application under Sec. 20 [*Vulcan Insurance Co. Ltd.* v. *Maharaja Singh & Another*, A.I.R. (1976) S.C. 287].

5. *Arbitration on the lines of arbitration without intervention of the Court.* After an order for reference is made by the Court, the arbitration shall proceed on the same lines as an arbitration without the intervention of the Court. This means that after the agreement is filed, the other Sections of the Act, so far as they are consistent with the agreement, shall apply to the agreement and the Court will give effect to the terms of the agreement.

ARBITRATION IN SUITS

(Chapter IV, Secs. 21 to 25)

Sometimes the parties to a suit which is pending before a Court may decide to settle it by arbitration. The procedure in such a case is as follows :

1. *Parties to suit may apply for order of reference* (Sec. 21). Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may apply in writing to the Court for an order of reference. Ther parties can however apply any time before the judgment is pronounced by the Court.

In a pending suit (under Sec. 21), reference to arbitration may be made if the following conditions are satisfied :

(a) The application should be made in writing to the Court for an order of reference.

(b) The parties interested in the suit must join in the application and there must be an agreement between those parties for reference of the matter in difference to arbitration.

(c) The application must be in respect of the matters in difference between the parties in the suit.

(d) The application must be made before the pronouncement of the judgment in the suit by the Court.

It is a question of fact and of substance in each particular case, whether any particular person is or is not interested in the specific dispute which is referred to abritration and no general rule can be laid down in that behalf. The question is to be decided from the whole circumstances of the case including his conduct up to the end of the proceedings and the Court is not merely to be guided by the written statement [*Sugnomal Vasandmal* v. *Parumal*, A.I.R. (1930) Sindh 256].

The following persons have been held to be interested within the meaning of Sec. 21 :

(a) An insolvent in a suit for redemption to which the Official Assignee joins [*Lalu Ram* v. *Nandu Lal*, 47 Cal. 555].

(b) All parties in a suit against a firm [*Seth Dooly Chand* v. *Munajee*, 25 C.L.J. 339].

(c) Assignor in a suit on a pronote [*Abdul Beg* v. *Nathu*, A.I.R. (1993) All. 739].

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(d) All co-sharers in a suit for partition [*Jagrup* v. *Kashi*, A.I.R. (1934) All. 658].

2. *Appointment of arbitrator* (Sec. 22). The arbitrator shall be appointed in such manner as may be agreed upon between the parties. Any defect in appointment of the arbitrator would vitiate the entire proceedings.

It may be noted that the Court has no independent power to appoint an arbitrator or the arbitrators. It can do so only in the manner agreed upon between the parties. If the parties do not agree in respect of the nomination of the arbitrator or the arbitrators, or if the person or persons nominated by them refuse to accept the arbitration, and the parties are desirous that the nomination shall be made by the Court, the Court, shall appoint the arbitrator or arbitrators.

3. *Order of reference by the Court* (Sec. 23). The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine. It shall specify in the order such time as it thinks reasonable for the making of the award. The word 'shall' makes it mandatory for the Court to fix the time for the making of the award [*Rabindra* v. *Jogendra*, A.I.R. (1925) Cal. 410]. The Court may, however, if it thinks fit, extend the time for making the award.

Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in the Act, deal with such matter in the suit.

Under Sec. 23 the Court has jurisdiction to refer to arbitration only the matters which are in dispute in the suit. The Court has also the power to refer a part of the matters in difference in the suit to arbitration, leaving the rest of the matters to be tried by the Court. The order of the Court should specifically state which matters are to be determined by the arbitrators and which matters are left to be determined by the Court.

The Court is bound to specify in its order of reference the time for the making of the award. Generally speaking, where the order does not fix a time limit for the making of the award, the reference is a nullity. But it does not follow that where the Court omits to specify the time in the order of reference but does so elsewhere in the proceedings, the reference is bad. The mere omission to mention the date in the order of reference itself does not vitiate the reference [*B. Subbarama Naidu* v. *B. Siddama Naidu & Others*, A.I.R. (1962) S.C. 671].

4. *Reference to arbitration by some of the parties* (Sec. 24). Where only some of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by Sec. 21, the Court may, if it thinks fit, refer such matters to arbitration in the manner provided in Sec. 21. But this would be possible only if the matters in difference between the parties applying for reference can be separated from the rest of the subject-matter of the suit. The suit shall, however, continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made. If these conditions are fulfilled and an order is made, the award will be binding only on the parties who have joined in the reference.

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In *Kheturam Bishambar Das* v. *Kashmiri Lal Ratan Lal*, A.I.R. (1959) Punj, 617, the Punjab High Court has held that the following conditions must be satisfied before reference can be made under Sec. 24 :

(a) The matter desired to be referred to arbitration can be separated from the rest of the subject-matter of the suit ;

(b) The suit continues so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference in the same manner as if no such application has been made ; and

(c) The award made in pursuance of such a reference shall be binding only on the parties who have joined in the application for being referred to the arbitrator under the provisions of Sec. 24 of the Act.

5. *Application of other provisions of the Act to arbitration in suits* (Sec. 25). The other provisions of the Act shall apply to arbitration in suits in so far as they can be made applicable. The Court may, in any of the circumstances mentioned in Secs. 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding arbitration and to proceed with the suit. Where the Court makes an order superseding the arbitration under Sec. 19, it shall proceed with the suit.

GENERAL

(Chapter V, Secs. 26 to 38)

Application of Chapter V (Sec. 26)

Save as otherwise provided in this Act, the provisions of Chapter V (Secs. 26 to 38) shall apply to all arbitrations.

Interim award (Sec. 27)

Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award. All references in this Act to an award shall include references to an interim award.

Under an interim award the arbitrator may decide some of the issues or some of the claims. For example, in a particular reference, he may determine the issue of liability of one of the parties and may leave the question of damages to be determined later.

Where it appears from the agreement that the disputes between the parties are to be decided by one and a complete award, Sec. 27 will have no application. If, however, there is no such provision in the arbitration agreement, the arbitrator or the umpire will have a right to make an interim award [*Mohal Lal* v. *Kalurma*, A.I.R. (1955) N.U.C. (M.B.) 488]. It should also be noted that interim awards are on the same footing as complete awards. The parties may have an interim award filed in Court under Sec. 14 and obtain a decree under Sec. 17. There is no distinction between an interim award and a complete award as to its enforceability and validity.

Power to Court only to enlarge time for making award (Sec. 28)

Sec. 28 confers power on the Court alone and not on the arbitrator or umpire or the parties to extend time for making an award. According to it,

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the Court may, if it thinks fit, enlarge from time to time, the time for making the award. It may do so whether the time for making the award has expired or not and whether the award has been made or not. The only exception to this rule is where the arbitration agreement specifically provides that the arbitrators or umpire may extend the time with the consent of all the parties, and the parties give their consent. Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Discretion of Court. The question of enlargement of time for making the award from time to time is in the discretion of the Court. The discretion must be exercised judicially and not in any arbitrary manner and on a consideration of all the circumstances of the case, including the conduct of the parties [*Prem Chand* v. *Himalaya Bank*, (1972) S.L.J. 415 Delhi].

The Courts have from time to time refused to extend the time in cases like the following :

(a) Where there has been a great delay, specially because of the negligence and dilatory tactics of one of the parties [*Oliver* v. *Mian Dost Mohamad*, A.I.R. (1935) Lah. 191].

(b) Where extension of time is likely to cause injustice or wrong to a party [*Ramanlal Hemandas* v. *Hotanbai Ramanlal*, A.I.R. (1914) Sindh 20].

(c) Where arbitrators are guilty of neglect in submitting their award in spite of several extensions [*Hrishikesh Das* v. *Lal Mohan Das*, A.I.R. (1920) Cal. 524].

As regards extension of time for making an award, the policy of law is that the arbitration proceedings should not be unduly prolonged. It is with this purpose in view that Clause 3 of Schedule I provides a period of 4 months to the arbitrators for making an award.

Interest on award (Sec. 29)

Where and in so far as award is for the payment of money the Court may in decree order interest from the date of the decree. The interest will be at such rate as the Court deems reasonable. It will be paid on the principal sum as adjudged by the award and confirmed by the decree.

In *Union of India* v. *Vishwanath Sud*, A.I.R. (1978) H.P. 31 it was held that once a sum is found due to the plaintiff, there is no reason as to why he would not be entitled to interest on such sum from the date of decree.

Discretion vested in the Court under Sec 29 regarding grant of interest is a judicial one which cannot be allowed to be injudicially exercised. Award of future interest from the date of decree till the date of payment puts a lead and tension on the other party to pay off the sum promptly since otherwise payment of the sum may be delayed indefinitely. The very purpose of resorting to an arbitration is a prompt disposal of the claim and unless future interest is granted, the whole purpose of arbitration may be frustrated. The award of future interest thus should be the normal rule unless there are very strong reasons to depart from it [*Nityananda Samantary* v. *State of Orissa*, A.I.R. (1987) Ori. 133].

Grounds for setting aside awards (Sec. 30)

These have already been discussed earlier in this Chapter.

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Jurisdiction of Courts (Sec. 31)

This has already been discussed earlier in the chapter.

Bar to suits contesting arbitration agreement or award—except by application (Secs. 32 and 33)

Bar to suits contesting arbitration agreement or award (Sec. 32). Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award. Likewise no arbitration agreement or award shall be set aside, amended, modifed or in any way affected otherwise than as provided in this Act.

The scheme of the Section is to prevent the parties to an arbitration from agitating questions relating to the arbitration in any manner otherwise than as provided by the Act [*Bajrang Lal* v. *Agarwal Bros.*, A.I.R. (1950) Cal. 267].

Arbitration agreement or award to be contested by application (Sec. 33). Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavit.

Where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

Comparison of Secs. 32 and 33. The object of Sec. 32 is to provide a speedy and cheap remedy to a party objecting to a reference or an award and instead of having to file a separate suit for the purpose, he can merely move an application which is decided on affidavits. [*United India Fire & General Insurance Co. Ltd.* v. *Bhagat Singh*, A.I.R. (1954) Punj. 171].

Sec. 32 contemplates an application for three purposes, namely,—

(i) When it is desired to challenge the existence of an arbitration agreement or award ;

(ii) When it is desired to challenge their validity ; and

(iii) When it is desired to have their effect determined.

Sec. 32 bars suits contesting arbitration agreement or award whereas Sec. 33 provides that the arbitration agreement or award is to be contested by an application. Sec. 33 is a natural corollary of Sec. 32. The net result of Secs. 32 and 33 is that where a party wants to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined, he cannot proceed by means of a suit but he must apply under the Act [*Kamal Singh* v. *Sekhar Chand*, A.I.R. (1952) Cal. 427].

Stay of legal proceedings (Sec. 34)

This has already been discussed earlier in this Chapter.

Effect of legal proceedings on arbitration (Sec. 35)

A reference or award shall not be rendered invalid by reason only of the commencement of legal proceedings upon the subject of the reference. But when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further

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proceedings in a pending reference shall, unless a stay of proceedings is granted under Sec. 34, be invalid. In Sec. 35 the expression 'parties to the reference' includes any person claiming under any of the parties and litigating under the same title.

Mere filing of the suit would not by itself render any reference or award invalid. But the reference or award shall be invalid if—

(a) the subject-matter of the reference and of the legal proceedings is the same ;

(b) the legal proceedings have been commenced with respect to the whole of the subject-matter of reference ;

(c) the legal proceedings are between all the parties to the reference, *i.e.*, the parties to the legal proceedings are the same as parties to the reference ;

(d) notice of the commencement of the legal proceedings is given to the arbitrators or the umpire ; and

(e) stay of the legal proceedings has not been granted under Sec. 34.

Power of Court where arbitration agreement makes an award a condition precedent to an action (Sec. 36)

Sometimes, it is provided in the arbitration agreement that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies. Under law of contract, an agreement which purports to oust the jurisdiction of the Court is unlawful and void on the ground of public policy (Sec. 28 of the Indian Contract Act, 1872). But an agreement under law of arbitration that no right of action shall arise unles an award has been made, is valid and enforceable. In case of policies of insurance, for example, it is generally stipulated that in case of any dispute arising thereunder, such dispute shall be referred to arbitration, and that the obtaining of an award shall be a condition precedent to the right to sue [*Scott* v. *Avery*, (1855) 5 H.L. Cas. 811]. In the above cases, the Court may order (whether under this Act or any other law) that the agreement shall cease to have any effect as regards any particular difference, *i.e.*, the Court may set aside such an agreement.

Sec. 36 further empowers the Court to order that the provision in the agreement (*i.e.*, the obtaining of an award shall be a condition precedent to the bringing of a suit with respect to the difference) shall cease to have any effect.

When can the power be exercised under Sec. 36 ? The Court may order that the arbitration agreement shall cease to have effect as regards any particular difference in the following cases :

(a) when the Court orders that the arbitration agreement shall cease to have effect;

(b) when an award becomes void ;

(c) when an award is set aside ;

(d) when the Court supersedes the reference and orders under Sec. 19 that the arbitration agreement shall cease to have effect with respect to the difference referred ;

(e) when the Court orders under Sec. 33 that the arbitration agreement is of no effect or is invalid or void.

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Limitation (Sec. 37)

Sec. 37 makes the Limitation Act, 1963 applicable to arbitrations. According to it, all the provisions of the Limitation Act shall apply to arbitrations as they apply to proceedings in Court. Sec. 37 has, however, no application to statutory arbitrations.

Accrual of cause of action. An arbitration agreement generally contains a clause that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement. A cause of action shall, however for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

Commencement of arbitration. An arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto—

(a) a notice requiring the appointment of an arbitrator, or

(b) where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

Bar of claims and extension of time. The terms of an agreement to refer future differences to arbitration may provide that any claims to which the agreement applies shall be barred unless *(a)* notice to appoint an arbitrator is given, or *(b)* an arbitrator is appointed, or *(c)* some other step to commence arbitration proceedings is taken within the time fixed by the agreement. If no such reference is made within the prescribed period, the claim will be barred. In such a case if a difference arises to which the agreement applies, and the Court is of opinion that in the circumstances of the case undue hardship would otherwise be caused, it may, on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper. The Court may extend the time notwithstanding that the prescribed period has expired.

Exclusion of interim period for limitation. Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963, for the commencement of the proceedings (including arbitration) with respect to the difference referred. 'Undue' means something which is not merited by the conduct of the claimant. Loss of goods in transit and amount at stake were held to be 'undue hardship' [*Sterling General Insurance Co. Ltd.* v. *Planters Airways (Pvt.) Ltd.*, A.I.R. (1975) S.C. 415]. In considering the question of 'undue hardship', it has been observed in *Liberian Shipping Corpn.* v. *A. King & Sons*, (1934) 1 All E.R. 934, the Court must take all the relevant circumstances of the case into account. The relevant circumstances may be—

(a) the degree of blameworthiness of the claimants in failing to appoint an arbitrator within the time ;

(b) the amount at stake ;

(c) whether the claimants have been misled ; and

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(e) whether through some circumstances beyond their control, it was impossible for the claimants to appoint an arbitrator in time.

Both the amount at stake and reasons for the delay are material considerations [*Stanhope Steamship Co. Ltd.* v. *British Phosphate Commrs.*, (1952) 2 Lloyd's Rep. 225].

Disputes as to arbitrator's remuneration or costs (Sec. 38)

This has already been discussed earlier in this Chapter.

APPEALS

(Chapter VI, Sec. 39)

Appealable orders (Sec. 39)

Sec. 39 deals with appeals. According to it, an appeal shall lie from the following orders passed under the Arbitration Act, 1940 (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, *viz.*, an order :

(a) superseding an arbitration ;

(b) on an award stated in the form of a special case ;

(c) modifying or correcting an award ;

(d) filing or refusing to file an arbitration agreement ;

(e) staying or refusing to stay legal proceedings where there is an arbitration agreement ;

(f) setting aside or refusing to set aside an award.

These provisions do not apply to any order passed by a Small Cause Court.

Sec. 39 allows appeals against orders passed under the express provisions of the Act itself. The words 'under the Act, and 'and from no others' refer to the express provisions of the Act and have no reference to appeals which the Code of Civil Procedure, 1908 provides from orders passed under the provisions of that Act [*Sri Kishan* v. *Radha Kishan*, A.I.R. (1952) All. 652].

Sec. 39 enumerates specific cases wherein an appeal shall lie. Further no second appeal will lie from an order passed in appeal. This means that orders enumerated in Sec. 39 will be open to one appeal only. The only exception is in case of orders passed by a Small Cause Court. These orders are not appealable at all.

The Courts have held from time to time that no appeal lies against the following orders :

(a) An order giving leave to revoke the authority of an arbitrator.

(b) An order remitting an award for reconsideration.

(c) An order refusing to remit an award.

(d) An order for extending the time for filing the award.

(e) An order under Sec. 7.

(f) An order under Sec. 8.

(g) An order dismissing an application under Sec. 17.

(h) An order making or recalling a reference.

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(i) An order refusing to grant an injunction.

Sec. 39 further provides that no second appeal shall lie from an order passed in an appeal under Sec. 39. But Sec. 39 in no way affects or takes away the right to appeal to the Supreme Court.

MISCELLANEOUS

(Chapter VII, Secs. 40 to 48)

Jurisdiction of Small Cause Court (Sec. 40)

A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save an application made under Sec. 21 (which deals with right of parties to a suit to apply to Court for order of reference).

A Small Cause Court has jurisdiction to entertain a suit to enforce an award [*Nanhelal Anandilal* v. *Singhai Gulab Chand*, A.I.R. (1944) Nag. 24]. But where a suit is brought on the Small Cause side, the trial Court has no jurisdiction to give a decree on the basis of an award. Where however a suit is pending before a Small Cause Court, this Court is the authority to whom application for stay under Sec. 34 is to be made and it may pass an order staying the suit [*Keshri Mal* v. *Ganeshdas Jivraj*, A.I.R. (1951) Ajm. 59].

Procedure and powers of Court (Sec. 41)

Subject to the provisions of this Act and of rules made thereunder the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court and to all appeals under this Act. Futher the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule (which deals with powers of the Court discussed earlier in this Chapter) as it has for the purpose of, and in relation to, any proceedings before the Court. This power of the Court shall not prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matter.

Service of notice by party or arbitrator (Sec. 42)

Sec. 42 makes provision for the mode of service of notices on a party to the arbitration agreement or to an arbitrator or umpire. According to it any notice required to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement. If there is no such provision in the arbitration agreement, the notice shall be served, either—

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by registered post to that person at his usual or last known place or abode or business in India. A notice sent by post to a person at his last known place of abode or business is a good and proper notice [*Kapur & Sons* v. *Raj Kumar Khanna*, A.I.R. (1955) Punj. 235].

Power of court to issue processess for appearance before arbitrator (Sec. 43)

Sec. 43 has been enacted with the object of assisting the arbitrator or umpire in carrying out the arbitration proceedings. Where the arbitrator or umpire

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desires to examine parties to the arbitration agreement or witnesses, the Court shall issue the same processes to them as the Court may issue in suits tried before it. The expression 'processes' includes summonses and commissions for the examination of witnesses and summonses to produce documents.

If any person *(a)* fails to attend in accordance with the process, or *(b)* makes any other default, or *(c)* refuses to give his evidence, or *(d)* is guilty of any contempt to the arbitrator or umpire during the investigation of the reference, he shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as he would incur for like offences in suits tried before the Court.

The words 'refusing to give evidence' used in Sec. 43 refer to a case where a person refuses to give evidence when placed on oath and required to answer a question put to him. It does not include a case where a party elects not to produce any evidence [*Janan* v. *Narain Das*, (1911) 11 L. C. 259].

Power of High Court to make rules (Sec. 44)

The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all procedings consequent thereon or incidental thereto ;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;

(c) the staying of any suit or proceedings in contravention of an arbitration agreement ;

(d) the forms to be used for the purposes of this Act ;

(e) generally, all proceedings in Court under this Act.

The rules framed by the High Court should not be inconsistent with the provisions of the Act. If no rules are framed by a High Court or if framed, there is nothing in the rules to the contrary, the ordinary procedure under the Code of Civil Procedure, 1908 will apply to proceedings under this Act [*Nainsukh Das Nagar Mal* v. *Gajanand Shyam Lal*, A.I.R. (1921) All. 273].

Government to be bound (Sec. 45)

The provisions of this Act shall be bindings on the Government. Sec. 45 gives a statutory recognition to Government's civil liability to be bound by the arbitration agreement and award to the same extent as an ordinary individual.

FOREIGN AWARDS

Foreign awards are dealt with in the following two enactments, *viz.*,

1. The Arbitration (Protocol and Convention) Act, 1937, and
2. The Foreign Awards (Recognition and Enforcement) Act, 1961.

1. THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937

Before passing this Act, the Government of India had for sometime under consideration the question of India's adherence to the Geneva Protocol on Arbitration Clauses, 1923 and the International Convention on the Execution of Foreign Arbitral Awards, 1927. The object of these Instruments is to meet the widely expressed desire of the commercial world that arbitration agree-

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ments should be ensured of effective recognition and protection. These Instruments were signed at Geneva on behalf of India, subject to reservation limiting India's obligations under the Instruments to comercial contracts.

The Instruments provide for their ratification by contracting party before they are enforced in respect of that party. Prior to ratification it is necessary to enact legislation to implement certain obligations contracted under these Instruments. The Arbitration (Protocol and Convention) Act, 1937 incorporates the legislation which was needed in this respect. The Act received the assent of the Governor General on 4th March, 1937.

The Preamble to the Act states that it is an Act to make certain further provisions respecting the law of arbitration in India.

The provisions of this Act shall have effect only from such date as the President may, by notification in the *Gazette* of India, appoint in this behalf, and President may appoint different dates for the coming into effect of different provisions of the Act [Sec. 1 (3)].

Reference to Sections in this part of the Chapter is to the Arbitration (Protocol and Convention) Act, 1937, unless otherwise stated.

The Act extends to the whole of India [Sec. 1 (2)].

Meaning of foreign awards (Sec. 2). In this Act 'foreign award' means an award on differences relating to matters considered as commercial under the law in India, made after the 28th day of July, 1924,

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies ;

(b) between persons who are subject to the jurisdiction of the powers as the Central Government, being satisfied that reciprocal provisions have been made, may by notification in the Official *Gazette* declare to be parties to the Convention set forth in the Second Schedule ; and

(c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies.

For the purposes of this Act an award shall not be deemed to be final if any proceedings for the purposes of contesting the validity of the award are pending in the country in which it was made.

Stay of proceedings (Sec. 3). If any party to a submission made in pursuance of an agreement to which the protocol set forth in the First Schedule applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may apply to the Court to stay the proceedings. The applicant can apply at any time after appearance and before filing a written statement or taking any other steps in the proceedings. The Court, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

The provisions of Sec. 3 are applicable notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908.

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Sec. 3 corresponds to Sec. 34 of the Arbitration Act, 1940

Effect of foreign awards (Sec.4). A foreign award shall, subject to the provisions of this Act, be enforceable in India as if it were an award made on a matter referred to arbitration in India. It shall be treated as binding for all purposes on the persons as between whom it was made. It may accordingly be relied on by any of those persons by way of defence, set-off or otherwise in any legal proceedings in India. Further any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Filing of foreign award in Court (Sec. 5). Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award filed in Court. The application shall however be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. On receiving such an application, the Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

Enforcement of foreign award (Secs. 6 to 8). Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award (Sec. 6).

Conditions for enforcement of foreign awards (Sec.7). In order that a foreign award may be enforceable under this Act :

(a) it must have been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed ;

(b) it must have been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties ;

(c) it must have been made in conformity witht the law governing the arbitration procedure ;

(d) it must have been become final in the country in which it was made ; and

(e) it must have in respect of a matter which may lawfully be referred to arbitration under the law of India.

Moreover the enforcement of the foreign award must not be contrary to the public policy or the law of India.

A foreign award shall not be enforceable under this Act if the Court dealinig with the case is satisfied that—

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award *(i)* was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or *(ii)* was under some legal incapacity and was not properly represented, or

(c) the award does not deal with the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration.

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If the award does not deal with all questions referred, the Court may, if it thinks fit, either postpone enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

Evidence (Sec. 8). The party seeking to enforce a foreign award must produce—

(a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made :

(b) evidence proviing that the award has become final ; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the necessary conditions are satisfied.

Where any document required to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

Saving (Sec. 9). The Act shall not—

(a) prejudice any rights which any person would have had of enforcing in India any award or availing himself in India of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of India.

Rule-making powers of the High Court (Sec. 10). The High Court may make rules consistent with this Act as to—

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto ;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act ; and

(c) generally, all proceedings in Court under this Act.

2. THE FOREIGN AWARDS (RECOGNITION AND ENFORCEMENT) ACT, 1961

This Act was passed to give effect to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards held at New York, on the 10th day of June, 1958, to which India is a party and for purposes connected therewith.

The Act extends to the whole of India. It received the assent of the President on 30th November, 1961. It applies to foreign awards made on or after 11th October, 1961.

Unless otherwise indicated, reference to Sections in this part of the Chapter is to the Foreign Awards (Recognition and Enforcement) Act, 1961.

The provisions of this Act are in most respects similar to the provisions of the Arbitration (Protocol and Convention) Act, 1937 (referred to as the old Act). Wherever there is a change, it has been pointed out.

Meaning of 'foreign awards' (Sec.2). In this Act, unless the context otherwise requires, 'foreign award' means an award on differences between

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persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1961—

(a) in pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies, and

(b) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official *Gazette*, declare to be territories to which the said Convention applies.

Stay of Proceedings (Sec.3). In this Act, the term 'arbitration agreement' has been substituted in place of 'submission' in the old Act.

The provisions of Sec. 4 (effect of foreign awards), Sec. 5 (filing of foreign award in Court) and Sec.6 of this Act (enforcement of foreign award) are exactly similar to the provisions of Secs. 4, 5 and 6 of the old Act.

Conditions for enforcement of foreign awards (Sec.7). A foreign award may not be enforced under this Act—

(a) if the party against whom it is sought to enforce the award proves to the Court dealing with the case that—

(i) the parties to the agreement were, under the law applicable to them under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it, or failing any indication thereon, under the country where the award was made ; or

(ii) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case ; or

(iii) the award deals with questions not referred or contains decision on matters beyond the scope of the agreement.

Provided that if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted may be enforced, or

(iv) the composition of the arbitral authority of the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which that award was made, or

(b) if the Court dealing with the case is satisfied that—

(i) the subject-matter of the difference is not capable of settlement by arbitration under the law of India ; or

(ii) the enforcement of the award will be contrary to public policy.

Evidence (Sec.8). The party applying for the enforcement of a foreign award shall, at the time of the application, produce—

(a) the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made ;

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(b) the original agreement for arbitration or a duly certified copy thereof ; and

(c) such evidence as may be necessary to prove that the award is a foreign award.

If the award or agreement required to be produced is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in India.

There is no change in Sec. 9.

Repeal (Sec. 10). The Arbitration (Protocol and Convention) Act, 1937 shall cease to have effect in relation to foreign awards to which this Act applies.

Sec. 10 of the old Act becomes now Sec. 11 of this Act.

TEST QUESTIONS

1. What is an arbitration agreement ? What can be submitted to arbitration ?
2. State the essentials of an arbitration agreement.
3. Explain 'submission to arbitration'. What matters may be referred for arbitration ? State the different ways in which such reference or submission to arbitration may take place ?
4. What is an arbitration agreement and what is its effect ? What are the advantages and disadvantages of settling disputes through arbitration ?
5. What matters *(a)* can, *(b)* cannot, be referred to arbitration ?
6. Write a note on the capacity of various persons to submit disputes to arbitration.
7. What are different modes of arbitration as provided in the Arbitration Act, 1940 ?
8. What is the effect of an arbitration agreement ? What are the conditions for stay of legal proceedings in case there is an arbitration agreement ?
9. Write a note on statutory arbitration.
10. State the implied conditions in an arbitration agreement.
(C.S.E. June 1993, December 1986, December 1987)
11. When would the Court stay legal proceedings when there is an arbitration agreement ?
12. Under what circumstances can a party to an arbitration agreement—
    (a) appoint a new arbitrator,
    (b) claim that this arbitrator should act as a sole arbitrator ?
13. State the powers of an arbitrator under the Arbitration Act, 1990 ?
(C.S.E. June 1991)
14. When can a Court appoint an arbitrator or umpire ? What is the procedure for such appointment ?
15. What are the powers and duties of an arbitrator ? What amounts to misconduct on the part of an arbitrator sufficient to vitiate the award ?
16. Under what circumstances can the authority of an arbitrator be revoked ?
(C.S.E. December 1988, June 1988)
17. When may the Court remove an arbitrator ? *(C.S.E. June 1986)*
18. Under what circumstances may the Court remove an arbitrator ?
(C.S.Er December 1989)
19. When may an award be modified or corrected ? What remedy, if any, is available to the aggrieved party against the order of the Court modifying or correcting the award ?

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20. Under what circumstances may the Court *(i)* modify, and *(ii)* remit for reconsideration the award of an arbitrator ?

21. Under what circumstances may the Court modify or correct the arbitration award ? *(C.S.E. December 1990-. June 1992)*

22. When can an award be set aside ?

23. Define 'legal misconduct' by an arbitrator. What are the consequences of such misconduct ?

24. When can the Court remit an award to an arbitrator for reconsideration ? When does such an award become void ? What happens when such an award becomes void ?

25. "An award can be set aside on the ground that it has been improperly procured or is otherwise invalid." Explain fully.

26. Mention the powers of the Court in respect of an award in arbitration proceedings.

27. When can the Court supersede arbitration procedings ?

28. What is the procedure for reference of matters to arbitration in a pending suit ?

29. Write a note on procedure for reference of matters to arbitration in a pending suit.

30. Write short notes on : *(a)* statutory arbitration, *(b)* foreign awards, *(c)* appealable orders, *(d)* Award is both an instrument of offence and defence.

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. A dispute arose between *A*, *B* and *C*, three neighbours, on the distribution of wages paid to the street watchman. *A* and *B* decided to refer the dispute to *X* for arbitration. *C* never gave his consent to this arbitration. *X*, by an award, fixed the liability of *A*, *B* and *C* to contribute wages in the ratio of 3:2:2. Is the award binding on *C* ?

[**Hint** : No, as *C* had not given his consent to refer the dispute to arbitration].

2. *J* did work for a Corporation under a contract by which disputes were to be refered to the Corporation's engineer. Disputes arose involving a probable conflict of evidence between *J* and the engineer. *J* commenced legal proceedings against the Corporation. Should the Court, on the application of the Corporation, stay the legal proceedings ?

[**Hint** : No. The action must proceed because the engineer would, in an arbitration, be placed in the position of a judge and witness [*Bristol Corpn.* v. *John Arid* & Co.].

3. A policy of insurance on a ship provided that in the event of loss the amount of loss should be determined by arbitration. It further provided that the award of the arbitrator was to a be condition precedent to the maintaining of an action in the Law Court. Can an action be maintained in the Law Court until an award was made ?

[**Hint** : No. *Scott* v. *Avery*, (1856) H.L.C. 811].

4. An apprenticeship deed between a minor and his employer contained an arbitration clause. Is the clause binding on the minor ?

[**Hint** : Yes. The clause is binding on the minor as it is for his benefit ; *Slade* v. *Metrodent Ltd.*].

5. A partnership deed contained an arbitration clause. A suit was filed by one of the parners against his other partners for misappropriation of partnership moneys and for improper retention of the balance.

Can the suit be stayed under Sec.34 ?

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[**Hint:** No, such matters are not within the contemplation of the arbitration clause ; *Cook* v. *Catehpole*, (1864) 11 LT 264].

6. Is reference to arbitration valid in the following cases ?

(1) In a correct between *A* and *B*, a local chamber of commerce is to arbitrate in case of any dispute arising between them. There are many local chambers of commerce in the area.

(2) In a contract with military farms department, the District Commander concerned is to be the arbitrator.

(3) A clause in an arbitration agreement says that "in the matter of dispute the case shall be referred to the Superintending Engineer of the circle."

(4) The arbitration clause in a contract speaks of disputes to be referred to arbitration in accordance with the rules of Millowners' Association, Bombay.

[**Hint :** *(1)* No, reference to arbitration is not valid unless the chamber of commerce which is to arbitrate is specified.

In cases (2) (4), the arbitration is valid ; Sec. 4].

7. During the pendency of a suit for possession, the parties requested one *G* to decide their case by arbitration. *G* proposed that a lottery might be drawn and one who obtains the 'winning ticket' should win the subject-matter of the suit. The parties agreed to this. Accordingly a lottery was drawn and one party won the property. The other party challenges this. Decide.

[**Hint :** The award is likely to be aside, even though parties had agreed to the lottery as a mode of settlement. The arbitrator must act judicially and impartially and follow rules of natural justice].

8. *A* is appointed a sole arbitrator by *B* and *C* to settle some dispute between them. *A* accepts some bribe from *B* and gives verdict in favout to *B*. *C* discovers this after two months. Can he ask for the setting aside of the award ?

[**Hint** : Yes. Sec.30].

9. An arbitrator sends notice by registered post to parties to appear before him on a certain date. One of the parties fails to appear. The arbitrator records the evidence of the other party in his absence and gives an award. What are the remedies open to the party against whom the award has been given in his absence ?

[**Hint :** The party against whom the award is given in his absence shall be bound by the award ; Sec. 30].

10. Are the following awards valid ?

(1) An award directing that a nuisance on the soil of one of the parties shall be removed, without saying by whom.

(2) An order to pay a specified sum within a certain time of the date of the award, the award bearing no date.

(3) An award directing *A* to pay a sum of money but mentioning no date for payment.

(4) An award that payment for land should be made at a rate varying according as it lay on one side or other of a line which was not clearly defined.

(5) An award that one of the parties should deliver up certain specified goods and several books, without naming the books.

(6) An award that a party shall put up certain fixtures, without defining their value or description.

(7) An award directing one of the parties to deliver up a deed which is in the custody of a third party.

(8) An award finding that a sum of money is due to the defendant from *A*, *B* and *C*, some or one of them, and directing the sum to be paid by them, some or one of them.

[**Hint :** In the first three cases the award is valid.

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In case (1) the presumption is that the owner of the soil is intended.

In case (2), the time will run from the date of the delivery of the award.

In case (3) the amount shall be payable within a reasonable time.

The awards in cases (4) to (8) are void for want of certainty].

11. An arbitrator was not given the submission but, thinking he understood matter in dispute, he made an award. When the award was taken up, it was found that it did not deal with the matters in dispute. The arbitrator thereupon read the submission, destroyed his award and made a new one. Is the new award valid ?

[**Hint :** No, the arbitrator, having made an award, was *functus officio* and had no power to make a new award].

12. Some matters in dispute between *A* and *B* were referred to arbitration of three named persons, two of whom were described as arbitrators and the third as an umpire but the position of the umpire was so vague as to leave it open to him to act either as an umpire or as an arbitrator. Will this reference to arbitration be regarded as valid in Law ?

[**Hint :** Yes. The third arbitrator will act as an umpire. Sec. 10].

13. X, a partner in XY and Co. submits a dispute relating to the firm for arbitration. The arbitrator gives his award but one of the partners pleads that award is not binding upon the firm. Is he justified ?

[**Hint :** The partner will be justified if X was not given an express authority to submit the dispute to arbitration. Sec. 19 (2) of Indian Partnership Act, 1932].

14. A clause in a contract provides that all disputes arising under the contract shall be referred to arbitration. State whether the Court can enforce the clause in the following circumstances :

(1) A clause in the contract itself provides that in event of arbitration, each party shall bear his own cost of the reference and the award.

(2) A dispute arises as to whether or not one of the parties is liable on the contract at all, on the ground that he signed it as agent and not as principal.

(3) A dispute arises which involves a question whether or not one of the parties has been guilty of fraud.

[**Hint :** (1) The Court can enforce this clause.]

(2) If the party signed the contract as agent, no liability attaches to the agent and as such the Court cannot enforce the arbitration clause against the agent.

(3) The Court can enforce the arbitration clause.

15. In a suit by *P*'s widow for maintenance by *P*'s will, all the parties agreed to appoint *A* as the sole arbitrator for settling the disputes and to abide by his decision. The arbitrator examined the defendant in the absence of the plaintiff and persued the will without letting her have any say. Can the award be set aside ?

[**Hint :** Yes, because the arbitrator violates the principles of natural justice, Sec. 30 ; *Union of India* v. *Ghaziabad Rail. Station*, A.I.R. (1972) A.P. 34].

16. *A*, *B* and *C* refer to arbitration a dispute regarding the partition of their ancestral property. The arbitrators give an award whereby *A* gets the entire ancestral property and *B* and *C* get equally some property belonging to *A*, *B* and *C* but which was not the subject-matter of arbitration. Can the Court set aside the whole award ?

[**Hint :** Yes, this is because the two parts of the award are inseparable; Sec. 15].

17. *A* entered into contract with *B* to supply wheat flour at specified rates. The contract carries the stipulation that *A* is entitled to higher rates only in case of rise in price of wheat by the Government and in case of dispute the matter will be referred to the sole arbitrator appointed by both the parties. The arbitrator allows the claim of *A* for higher rates due to rise in market price. *B* applies to the Court for setting aside the award. Can he succeed ? *(C.S.E. June 87)*

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[**Hint :** Yes. *Metro Electric Co.* v. *Delhi Development Authority*].

18. A small scale enterpreneur obtains loan from Himachal Pradesh Small Scale Industries Development Corporation. One of the conditions of loan agreement is that in the event of any dispute the General Manager (Credit) of the Corporation shall act as a sole arbitrator. Later the enterpreneur wants to challenge the award on the ground that the general manager was an interested person. Can he do so ? *(C.S.E. December 1996)*

[**Hint :** No. *Allen Berry & Co. Pvt. Ltd.* v. *Union of India*].

19. *A* and *B* enter into an arbitration agreement under which a sole arbitrator is to be appointed by consent of both *A* and *B*. When *B* (one of the parties to the agreement) refuses to concur in the appointment of the arbitrator, what course is available to A ?

[**Hint :** Refer to Sec. 8].

20. *A* and *B* enter into an agreement which provides that the matter in dispute between them shall be referred to the sole arbitration of any person appointed by *A* and also no person other than a person appointed by *A* should act as an arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all. On the failure by *A* to appoint an arbitrator, *B* applies to the Court for appointment of an arbitrator and making a reference. The Court appoints an arbitrator who makes an award. *A* challenges the award that the arbitrator had no jurisdiction. Will he succeed ? *(C.S.E. December 1988)*

[**Hint:** Yes. The Court cannot appoint an arbitrator contrary to the terms of the agreement (*Ama Corpn.* v. *F.C.I.*, (1981) Mad. 121)].

21. An arbitrator refuses to adjourn the hearing in an arbitration matter before him to the respondent on the ground that he has to decide the dispute within 4 months. What will be the effect of such refusal ? *(C.S.E., December 1991)*

[**Hint :** If the arbitrator acts unreasonably, he violates the principles of natural justice. In such a case the Court way set aside the award under Sec. 30].

22. *A* obtains an award against *B* in repect of an arbitration agreement entered into by *A* and *B*. The award is then filed before the Court for obtaining a decree in terms of the award. *B* takes the plea that the award is not binding upon him because a condition to this effect was not incorporated in the arbitratrion agreement. Will be succeed ? *(C.S.E. June 1992).*

[**Hint:** No (Sec. 3 and the First Schedule)].

23. Four issues were referred to an arbitrator for determination. The arbitrator left undetermined one of the issues by his award. State the powers of the Court in this regard. *(C.S.E. December 1992)*

[**Hint :** Refer to Sec.16].

24. *A* and *B* make an agreement in writing to refer a dispute between them to an arbitrator. In spite of this agreement *A* files a suit against *B* relating to that dispute in a Court. Advise *B*. *(C.S.E. June 1993)*

[**Hint :** *B* may apply to the Court to stay the proceedings. Sec. 34].

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10

The Limitation Act, 1963

The law for the limitation of suits and other proceedings is contained in the Limitation Act, 1963. The Act is a consolidating Act. It extends to the whole of India except the State of Jammu and Kashmir (Sec. 1 (2]. It came into force on 1st January, 1965.

Reference to Sections

Reference to Sections in this Chapter, unless otherwise indicated, is to the Limitation Act, 1963.

Object of the Act

The object of the Act is to 'quiet long possession' and extinguish 'stale demands' (*Luchmee* v. *Ranjeet*, 20 W.R. 375, P.C.). The principle upon which the law of limitation is based is *vigilantibus non dormientibus leges subvenient*, i.e., that the law aids the diligent and not the indolent. It thus helps and promotes vigilence and alertness in exercise of rights and forwns upon inordinate laches. If a man has been negligentl;y sleeping over his rights for an undue length of time, law does not allow him to litigate in respect of those rights.

In *Livi* v. *Ramji*, 3 Bom. 207, it was observed that the object of the Act is not to create or define causes of action but stmply to prescribe the period within which existing rights can be enforced in Courts of Law.

The Limitation Act is a complete Code. No Court is entitled to invoke any principle for the purpose of holding a claim as not barred by the law of limitation which is not contained or necessarily implied in any of the Sections or Articles of the Limitation Act.

Limitation is the statute of repose, peace and justice

The principle of public policy requires that remedies for violated rights should be sought in a Court without unreasonably long delay. This is because with passage of time all evidence of the facts may be lost or obliterated. Thus "all Statutes of Limitation have for their object the prevention of the rearing up of claims at great distance of time when evidences are lost, and in all well-regulated countries the quieting of possession is held an important point of policy." [*Trustee of the Dundee Harbour* v. *Daugall*, (1852) 1 Macqueen H.L. 32]. In this sense, these laws have been variously described as 'statutes' of repose, 'statutes of peace', and 'statutes of justice'.

Statutes of repose. All Statutes of limitation are one of repose because they extinguish stale demands, and quiet titles. They lay at rest claims which might otherwise have disturbed the peace of the community. They restrict controversies to a fixed period of time lest they should become immortal while men are mortal. If the law of limitation were not there, you may have to be answerable

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for some debt which your great-grandfather may have incurred in remote antiquity and whose veracity you may have no means of verifying.

Statutes of peace. Statutes of limitation secure peace as they ensure security of rights. They are definite rules of law giving to the population for whose benefit they have been framed, a guarantee that after a lapse of certain period they may rest in peace and rely upon titles or other rights which they have acquired (*Ramjiwan Mal* v. *Chand Mal*, 10 All. 587).

Justice Story in his *Conflict of Laws* observed in this regard as follows :

> "Laws thus limiting suits are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds and to supply deficiency of proofs arising from the ambiguity or obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished or ought to be held extinguished whenever they are not litigated in the proper forum (Court) within the prescribed period. They take away all solid grounds of complaint because they rest on the negligence or neglect of the party himself. They quicken diligence by making it in some measure equivalent to right."

Statutes of justice. Statutes of limitation secure justice as by lapse of time evidence may have been destroyed. Lord Plunkett observes in this regard : "Time holds in one hand scythe ; in the other an hour-glass. The scythe mows down the evidence of our rights, the hour-glass measures the period which renders that evidence superfluous."

Law of limitation is absolute law

The parties cannot circumvent operation of law of limitation by any private agreement. Sec. 28 of the Indian Contract Act, 1872 also specifically provides that every agreement by which any party thereto is restrained absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceeding in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent. Likewise, an agreement not to plead the law of limitation in a suit is void.

Limitation bars remedy but does not extinguish right

The law of limitation only bars the remedy by way of a suit, *i.e.* if the period of limitation expires, the party entitled to file the suit for enforcement of a right is debarred from doing so. However, his original right on which the suit was to be based is not barred. The law of limitation does not either create or extinguish rights. Its intention is not to give a right where there is none (nor to extinguish a right where there is one) but to interpose a bar after a certain period to a suit to enforce an existing right (*Harinath* v. *Mathur*, 20 I.A. 18). The principle of limitation is not to enable suits to be brought within certain periods but to forbid them from being brought after certain periods, each of which starts from some definite event (*Hurri Bhushan* v. *Upendra*, 24 Cal. 1 (7) P.C.).

It would thus be seen that limitation only bars the judicial remedy. It does not extinguish the right. Where, for example, the recovery of a debt has become time-barred by the lapse of the prescribed period of limitation, the right to the debt is not extinguished. If the debtor, without being aware of the bar of time, pays the debt, he cannot sue the creditor to refund the money to him on the ground that his claim for recovery of the debt had become time-barred.

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Exception. There is one excption to the above rule provided by Sec. 27 which runs thus : "At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." Thus where a person's right to institute a suit for the possession of any property has become barred by limitation, his right to the property itself shall be extinguished.

DEFINITIONS

1. *Applicant* [Sec. 2 *(a)*]. Applicant incudes—

(i) a petitioner;

(ii) any person from or through whom an applicant derives his right to apply ;

(iii) any person whose estate is represented by the applicant as executor, administrator or other representative.

2. *Application* [Sec. 2 *(b)*]. It includes a petition.

3. *Bill of exchange* [Sec. 2 *(c)*]. If includes a hundi and a cheque. Sec. 5 of the Negotiable Instruments Act, 1881 defines a 'bill of exchange' as follows :

> "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

Sec. 6 of the above Act defines a cheque thus :

> "A cheque is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand."

A hundi is a vernacular form of a bill of exchange

4. *Bond* [Sec. 2 *(d)*]. It includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

5. *Promissory note* [Sec. 2 *(k)*]. It means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight.

Sec. 4 of the Negotiable Instruments Act, 1881 defines a promissory note is follows :

> "A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

6. *Plaintiff* [Sec. 2 *(i)*]. 'Plaintiff' includes —

(i) any person from or through whom a plaintiff derives his right to sue ;

(ii) any person whose estate is represented by the plaintiff as executor, administrator or other representative.

7. *Defendant* [Sec. 2 *(e)*]. 'Defendant' includes —

(i) any person from or through whom a defendant derives his liability to be sued ;

(ii) any person whose estate is represented by the defendant as executor, administrator or other representative.

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8. *Easement* [Sec. 2 *(f)*]. It includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to, or subsisting upon the land of another.

9. *Foreign country* [Sec. 2 *(g)*]. Foreign country means any country other than India.

10. *Good faith* [Sec.2 *(h)*]. The definition of the term good faith in Sec. 2 *(h)* is negatively postulated. According to it, nothing shall be deemed to be done in good faith which is not done with due care and attention.

Sec. 3 (22) of the General Clauses Act, 1897 gives the definition of the term 'good faith' in positive terms. According to it, "a thing shall be deemed to be done in 'good faith', where it is in fact done honestly, whether it is done negligently or not."

11. *Period of limitation and prescribed period* [Sec. 2 *(j)*]. 'Period of limitation' means the period of limitation prescribed for any suit, appeal or application by the Schedule to the Act, and 'prescribed period' means the period of limitation computed in accordance with the provisions of this Act.

12. *Suit* [Sec. 2 *(l)*]. A suit does not include an appeal or an application.

A suit ordinarily means a civil proceeding instituted by the presentation of a plaint [*Hans Raj* v. *Official Liquidator*, (1933) A.L.J. 175].

13. *Tort* [Sec. 2 *(m)*]. It means a civil wrong which is not exclusively the breach of a contract or the breach of a trust.

14. *Trustee* [Sec. 2 *(n)*]. 'Trustee' does not include a —

(a) benamidar,

(b) a mortgagee remaining in possession after the mortgage has been satisfied, or

(c) a person in a wrongful possession without title.

The definition of 'trustee' is negative in that it says that a trustee does not include certain category of persons

LIMITATION OF SUITS, APPEALS AND APPLCATIONS
(Part II, Secs. 3 to 11)

Bar of limitation (Sec. 3)

The Schedule (reproduced at the end of this Chapter) to the Limitation Act prescribes periods of limitation and the time from which these periods begin to run in respect of suits, appeals and applications. Every suit, appeal or application shall be brought within the period of limitation as specified in the Schedule. This rule is incorporated in Sec. 3.

Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Sec. 3 shall apply as if such period were the period prescribed by the Schedule. For the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Secs. 4 to 24 (inclusive) shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law [Sec. 29 (2)].

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Bar. Subject to the provisions contained in Secs. 4 to 24 (inclusive), every suit instituted, appeal preferred and application made after the prescribed period *shall* be dismissed although limitation has not been set up as a defence.

'Shall' connotes a mandate and leaves no option to the Court [*Rajkishore* v. *Kangali*, A..I.R. (1972) Ori. 119]. This means the Court is under a duty to raise the plea itself and dismiss the suit, appeal or application if it has been filed beyond the time prescribed for it by the Schedule to the Act [*Shanker Dass Narayan Das* v. *Sita Ram Jawala Prasad*, A.I.R. (1950) Pepsu 13].

The provision in Sec. 3 is absolute and mandatory *vis-a-vis* the duty of the Court [*Sheikh Maqbool* v. *Union of India*. A.I.R. (1960) Ori. 146]. The Court can claim no choice except to obey it in full [*Venkatsubbamma* v. *Subba Rao*, A.I.R. (1964) A.P. 462]. It is against law and equity to overlook limitation [*Lakshminarasamma* v. *Seshayya*, A.I.R (1951) Mad. 491].

When to take plea of limitation. The plea of limitation should normally be taken in the Court of first instance. It may also be raised for the first time in appeal or even in second appeal, and the first appellate Court or the Second appellate Court generallly listens to the plea of limitation if it can be decided without any further inquiry. But the appellate Court will not allow it if it involves—

(i) a further inquiry into some question of fact,

(ii) taking of evidence for its decision.

Institution of a suit or a claim and making an application. For the purposes of the Limitation Act, the rules as to institution of a suit or a claim and making an application are as follows :

(a) Institution of a suit. A suit is instituted—

(i) in an ordinary case, when the plaint is presented to the proper officer ;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made ; and

(iii) in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the Official Liquidator.

'Suit' does not include an appeal or an application.

(b) Institution of a claim. Any claim by way of a set-off or a counter-claim shall be treated as a separate suit and shall be deemed to have been instituted —

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded ;

(ii) in the case of a counter-claim, on the date on which the counter-claim is made in the Court.

(c) Making an application. An application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.

'Application' includes a petition.

Eceptions to bar of limitation

1. **Expiry of period when Court is closed** (Sec. 4). Where the prescribed period for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made

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on the day when the Court reopens. In *C.F. Angadi* v. *Hirianyya*, A.I.R. (1972) S.C. 239, the Supreme Court reiterated the generally accepted principle of law under which parties who are prevented from doing a thing in a Court on a particular day, not by any act of their own, but by the Court itself, are entitled to do it at the first subsequent opportunty. Sec. 4 incorporates an elementary rule of justice and it in no way extends the period of limitation [*Raja Pande* v. *Seopujan Pande*, A.I.R. (1942) All. 429]. A Court shall be deemed to be closed on any day within the meaning of Sec. 4 if during any part of its normal working hours it remains closed on that day.

2. **Extension of prescribed period in certain cases** (Sec. 5). The general rule of law, as contained in Sec. 3, is that every suit instituted, appeal preferred and application made after the prescribed period shall be dismissed. Sec. 5 is an exception to this rule. It should, however, be noted at the outset that Sec. 5 applies only to appeals and applications ; it does not apply to suits [*Rampher* v. *Ajudhia Singh*, A.I.R. (1925) Oudh 369].

Admission of an appeal or application after the prescribed period. According to Sec. 5, any appeal or any application (other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908) may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period. If the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period, it may be a sufficient cause within the meaning of Sec. 5.

The reason why Sec. 5 does not apply to suits is that the period of limitation prescribed in most of the suits extends from 3 to 12 years while it does not exceed 6 months in case of appeals and applications. In view of the short period prescribed for appeals and applications, a concession has been given in Sec. 5.

Extension of time cannot be claimed as a right. The extension of time under Sec. 5 cannot be claimed as a matter of right. The power of the Court to grant this concession is discretionary [*Kaura Mal* v. *Mathura Dass*, A.I.R. (1959) Pun. 645]. The discretion must, however, be exercised in a judicial and not arbitrary manner. First of all, *sufficient cause* must be shown by the appellant or applicant for not filing the appeal or application within the prescribed period. If this condition is satisfied, the Court may exercise the discretion in his favour.

Sufficient cause. The term 'sufficient cause' is not defined anywhere in the Limitation Act. It means a cause which is beyond the control of the appellant or applicant invoking the aid of Sec. 5. An avoidable cause cannot be a 'sufficient cause'. The expression should, however, receive a liberal construction as to advance substantial justice when no neligence or inaction or want of *bona fides* is imputable to the appellant or applicant. If the delay is considered reasonable, the Court should not apply too exacting a standard of diligence.

What is 'sufficient cause' has to be objectively assessed by the Courts. 'Sufficient cause' or 'sufficient reason' has not been purposefully crystallised into any rigid definition. The Legislature has particularly left this judicial power of determining 'sufficient cause' unfettered so that justice may be effectively done [*Ambica* v. *Manikganj Loan Office*, (1927) I.L.R. 55 Cal. 798].

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The following are some of the instances which may be pleaded as sufficient cause:

(1) *Illness.* High fever, attended with delirium by reason of which the applicant was absolutely confined to bed in consequence of which the application for review was delayed by 4 days, was a sufficient cause for excusing the delay [*Gouri Shanker* v. *Kashi Nath*, A.I.R. (1934) 367].

(2) *Minority, insanity or idiocy* (Sec. 6).

(3) *Imprisonment.* Imprisonment in a criminal jail may be considered as a sufficient cause in certain circumstances and the time spent in jail may be deducted [*Maharaj Narain* v. *Banoji*, 21 P.R. 1904].

(4) *Mistake of counsel. A bona fide* mistake of a counsel in computation of limitation period for appeal [*Punjabi University* v. *Acharya Swamy Ganesh*. A.I.R.. (1972) S.C. 1973] or a mistaken advice given by a legal practitioner may, in the circumstances of a particular case, give rise to a sufficient cause, though there is certainly no general doctrine which saves from the result of wrong advice [*Rajendra Bahadur* v. *Rajeshwar Bali*, A.I.R (1937) P.C. 276]. Likewise mistaken view of law, if it is honest and induced by erroneous advice of a competent lawyer, will be a sufficient cause (*Narsingha Charan Nandy* v. *Trigunanand Jhakhoware*, (1938) I.L.R. 17 Pat. 507]. If the mistake is not *bona fide*, or if the counsel has not acted with care and caution or if the mistake proceeds from misconduct or negligence or want of reasonable skill, the delay will not be excused [*Mohan Lal* v. *Tej Singh Thakur*, A.I.R. (1958) M.P. 69].

(5) *Bona fide mistake on the part of the applicant or appellant* [*State of Assam* v. *Haji Habib*, I.L.R. (1951) Ass. 252]. Where a person *bona fide* thinking that it was the proper course filed a suit instead of appealing from a decree and soon after found out the error and preferred the appeal, it was a 'sufficient cause' under Sec. 5 (*Ghulam* v. *Shahbaz*, 162 P.R. 188).

(6) *Ignorance of difference between limitation for appeal and application to do so as pauper* [*Pratap* v. *Gulab Singh*, A.I.R. (1953) Kutch 31].

(7) *Handicap due to heavy involvement in litigation* [*Nirmala Sundri* v. *Sudhir Kumar*, A.I.R. (1955) Cal 48].

(8) *Absence on military duty* [*Haranga* v. *Nui*, A.I.R. (1959) Ass. 7].

3. **Persons under legal disability** (Secs. 6 to 8). The general rule of law is that limitation begins to run from the date of the cause of action. But in case of persons suffering from some legal disability (*e.g.*, minority, insanity or idiocy), the period of limitation runs from the date of the cessation of disability. The rules to this effect are contained in Secs. 6, 7 and 8. Sec. 6 deals with legal disability of a person. Sec. 7 is a disabling Section. It prescribes the conditions under which the benefit under Sec. 6 cannot be availed of. Sec. 7, in so far as it takes away the right conferred by Sec. 6, has to be strictly construed [*Kunti* v. *Devki*, A.I.R. (1939) Mad. 907]. Sec. 8 on the other hand defines the limits within which the benefit can be availed of. The provisions in Secs. 6, 7 and 8 should be read together. The concessions under Secs. 6 and 7 to a person under legal disability are subject to the overriding limitation contained in Sec. 8 that the time in no case shall be extended beyond 3 years from the cessation of disability [*Bajnath Shah* v. *Shankar Shah*, (1957) B.L.J.R. 645].

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The provisions of Secs. 6, 7 and 8 are as follows:

(1) **Legal disability** (Sec. 6). A person entitled to institute a suit or make an application for the execution of a decree may, at the time from which the prescribed period is to be reckoned, be a minor or insane or an idiot. Such a person may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the Schedule (reproduced at the end of the Chapter) to the Act.

For the purposes of Sec. 6, 'minor' includes a child in the womb.

(a) Successive or several disability. Where one legal disability is followed by another legal disability, the disabilites are successive. Likewise several disabilities may co-exist concurrently. Thus the person under legal disability may at the time from which the prescribed period of limitation is to be reckoned be affected by many such disabilities, or before his disability has ceased, he may be affected by another disability. Such a person may institute the suit or make the application within the same period after all disabilities have ceased, as would otherwise have been allowed from the time specified in the Schedule to the Act. Thus where several disabilities co-exist concurrently in the plaintiff, the time does not commence to run against him till all disabilities have ceased [*Stuart* v. *Mellish*, (1742) Atk. 610].

(b) Death. Where the disability continues up to the death of the person under legal disability, his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been allowed from the time specified in the Schedule to the Act. Where the legal representative is, at the date of the death of the person whom he represents, affected by any such disability, the above rules shall apply.

A person under disability may die after the disability ceases within the period allowed to him under Sec. 6. In such a case his legal representative may institute the suit or make the application within the same period after the death, as would otherwise have been available to the person had he not died.

The principle underlying Sec. 6 is to protect the persons of unsound mind who are not capable of forming a rational judgment and understanding the full implications of their acts and omissions as regards bringing of suits to protect their interest.

It may be noted that Sec. 6 does not apply to appeals.

(2) **Disability of one of several persons** (Sec. 7). Sometimes one of several persons jointly entitled to institute a suit or make an application for the execution of a decree may be under any legal disability (minority, insanity or idiocy). In such a case if discharge can be given without the concurrence of the person under legal disability, time will run against them all. But, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or unitl the disability has ceased. The manager of a Hindu undivided family governed by the Mitakshara law shall be deemed to be capable of giving a discharge without the concurrence of the other members of the family only if he is in management of the joint family property.

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Where the right of suit resides in a number of individuals the combined effect of Secs. 6 and 7 is that if any of them is under a legal disability but one of them is legally competent to give a full discharge on behalf of all of them, the suit will be governed by the ordinary law of limitation. But if there is none competent among them to give a valid and full discharge, then time will not run against any of them until one of them ceased to be under disability [*Ahinsa Bibi* v. *Abdul Kadir*, 25 Mad. 26].

Examples. *(a)* *A*, *B* and *C* are partners in a firm. *A* is insane while *B* is a minor. The firm owes a debt to *D*. *C* can give a discharge of the debt without the concurrence of *A* and *B*. Time runs against all the three partners.

(b) A firm of which *A*, *B* and *C* are partners owes a debt to *D*. *A* is a minor while *B* and *C* are insane. Time will not run against any of the three partners until *A* attains majority or *B* or *C* becomes sane.

Sec. 7 applies to a discharge from every kind of liability, including a liability in respect of any immovable property.

It may be noted that Sec. 7 does not apply to appeals.

(3) **Special exceptions** (Sec. 8). Secs. 6 and 7 do not apply to suits to enfore rights of pre-emption (the right of purchasing property before or in preference to other persons). Likewise nothing in Sec. 6 or in Sec. 7 shall be deemed to extend, for more than 3 years from the cessation of the disability or the death of the person affected thereby, the period of limitation for any suit or application. This means period of limitation canot be extended beyond 3 years from the cessation of disability. But if the ordinary period of limitation computed from the original accrual of the cause of action expires more than 3 years after the, cessation of the disability, such period will allowed.

Sec. 8 is ancillary to and restrictive of the concession granted in Secs. 6 and 7. It does not confer any substantial privilege [*Rangaswami* v. *Thangavelu*, 42 Mad. 637], but is in the nature of a Proviso to Secs. 6 and 7 [*Janardan* v. *Nilkantha*, A.I.R. (1952) Ori. 31]. According to it, in no case can the period of limitation be extended to anything beyond 3 years from the cessation of the disability [*Vasudeva* v. *Maguni*, 24 Mad. 387].

Continuous running of time (Sec.9)

The fundamental rule of law of limitation is that if at the date on which the cause of action arises a person is under no disability or inability, time runs continuously and without any break or interruption until the entire prescribed period has run out and no disability or inability to sue occurring subsequently can stop it.

Time can run only when cause of action accrues [*Harinder Singh* v. *Anant Ram*, A.I.R. (1939) Lah. 6]. The cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the relevant facts have happened which are material to be proved to entitle the plaintiff to succeed [*Colburn* v. *Colledge*, (1897) 1 Q. B. 702]. Once limitation has begun to run even a reference to arbitration or an agreement to refer cannot stop it [*Murthi* v. *Goppaya*, 40 Mad. 701]. Once it runs during the lifetime of a full owner, no subsequent alteration in the title can postpone the bar (*Lilabati* v. *Bishun Chobay*, 6 C.L.J. 321).

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Sec. 9 which contains the above rule provides in this regard thus :

"Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it."

Disability connotes legal disability. It is want of legal qualification to act, *e.g.*, want of capacity to act. It is the state of being minor, insane or idiot. Inability, on the other hand, connotes want of physical power to act. Illness, poverty, etc. are instances of inability [*Purno Chander* v. *Sassoon*, A.I.R. (1919) Cal. 1018].

Examples. (a) A right to sue accrues to P on 1st Junuary, 1993 when he is under no disability. On 1st April, 1994 he becomes insane. Time runs against him from 1st January, 1993. His subsequent insanity is no bar to the running of time.

(b) A right to sue accrues to *P* during his minority. 6 months subsequent to his attaining majority, he becomes insane. Time runs against him from the date of his attaining majority. His subsequent insanity is no bar to the running of time.

Sec. 9. contemplates a case of *subsequent* disability or inability and not the initial disability or inability. It may further be noted that the disability or inability contemplated by Sec. 9 is confined to such cases as are mentioned in the Act itself, and new exemptions cannot be recognised [*Sarat Kamini* v. *Nagendra*, A.I.R. (1926) Cal. 65].

Exceptions, *i.e., suspension of limitation.* The running of period of limitation for a suit is suspended in the following cases :

(1) Where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.

(2) Where the plaintiff is suffering from some legal disability, the running of period of limitation shall be suspended.

(3) In computing the period of limitation prescribed for an appeal or an application for leave to appeal or for revision or review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(4) In computing the period of limitation for a suit or appeal, the time taken for prosecuting an application for leave to sue as a pauper shall be excluded if such leave is necessary.

(5) When the plaintiff has been prosecuting another civil proceeding *bona fide* in a Court without jurisdiction, the time during which he has been prosecuting with due diligence shall be excluded in computing the period of limitation.

(6) Where an injunction or order has been obtained to stay the institution of a suit or the execution of a decree, the time of continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded in computing the period of limitation.

(7) Where notice has been given before the institution of a suit in accordance with law the limitation will be suspended during the period of notice.

(8) In a suit for possession by a purchaser at an execution sale, the limitation will be suspended during the time for which the proceeding to set aside the sale has been prosecuted.

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(9) Where the defendant is absent from India or from territories outside India under the administration of the Central Government, the time during which he is so absent shall be excluded in computing the period of limitation.

(10) Where there is nc person capable of suing or being sued, the running of period of limitation shall be suspended.

(11) Where the right to sue or make an application is based upon the fraud of the defendant, or any document necessary to establish such right has been fraudulently concealed from the knowledge of the plaintiff by the fraud of the defendant, the period of limitation shall be suspended still the plaintiff has discovered the fraud.

Properties held in trust (Sec. 10)

Sec. 10 declares that trust properties shall not be subject to any law of limitation. The basic principle behind Sec. 10 is the recognition of the diction "once a trust, always a trust' unless a Court judgment affects the scheme of trust. If however the trust property finds its way into the hands of an assignee for valuable consideration, the ordinary law of limitation shall apply, *i.e.*, the beneficiary must bring the suit within the period of limitation. Sec. 10 runs thus :

> "Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The conditions to be fulfilled before the beneficiary (the person for whose benefit a trust is created) can have the benefit of Sec. 10 are as follows :

1. There must be a trust for a specific purpose, *i.e.*, there must be an express trust. 'Trust for a specific purpose' connotes trust created for some defined or particular purpose or object as distinguished from trusts of a general nature (*Greender* v. *Mackintosh*, 4 Cal 897).

Sec. 10 applies only in case of express trusts, *i.e.*, trusts for some definite or particular purpose ; it does not apply to implied or constructive trusts.

> *Example.* On the death of her husband in 1988 a widow handed over a certain sum of money to her brother *B*, for the benefit and education of her two sons *(i.e.*, a specific purpose). *B* applied part of the trust money for the specific purpose and used the balance for his own purpose. On *B*'s death, his representatives who were bound to refund the balance and to account, took the plea that the suit had become time-barred. *Held*, the money being vested for specific purpose, a suit for account and refund of the trust property is not barred by lapse of time.

2. There must be property which has become vested in trustee, or his legal representatives or assigns (without valuable consideration).

3. The suit must be for the purpose of following in the hands of trustee or his legal representatives or assigns the trust property or its proceeds or for an account of such property or proceeds. The words " for the purpose of following in his or their hand such property" in Sec. 10 mean "for the purpose

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of recovering the property for the benefit of the trust in respect of which it had been given," [*Balwant Rao* v. *Puran Mal*, 6 All. 19 (P.C)].

For the purposes of Sec. 10 any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.

Suit on foreign contracts (Sec.11)

Law of the place where action is instituted. The general rule of English law is that remedies, as distinguished from rights, are to be pursued according to the law of the place where the action is instituted. The reason of the rule is "that personal contracts are to be interpreted according to the law of the place where they are made. It is a rule equally well settled that remedies on contracts are to be regulated and pursued according to the law of the place where the action is instituted, which law is commonly called the *lex fori* and not by the law of the place of the contract."

Sec. 11 which incorporates this rule lays down that contracts entered into in a foreign country are subject to the provisions of the Limitation Act, 1963.

The rule is further clarified in *Trimbay* v. *Vignier*, (1834) 1 Bing N.S. 151:

> "The rule which applies to the case of contracts made in one country and put in suit in the courts of another country aappears to be this, that interpretation of the contract must be governed by the law of the country where the contract was made but the mode of suing and the time within which the action is to be brought must be governed by the law of the country where the action is brought."

Although Sec. 11 speaks of suits on contracts only, yet the principle of this Section applies to all suits and proceedings [*Hukum* v. *Gyanendra*, 14 Cal. 570].

The provisions of Sec. 11 are as follows :

(1) Suits instituted in India on contracts entered into in the State of Jammu and Kashmir or in a foreign country shall be subject to the rules of limitation contained in this Act.

(2) No rule of limitation in force in the State of Jammu and Kashmir or in a foreign country shall be a defence to a suit instituted in the said territories on a contract entered into in that State or in a foreign country unless—

(a) the rule has extinguished the contract ; and

(b) the parties were domiciled in that State or in the foreign country during the period prescribed by such rule.

This foreign rules of limitation are not allowed to be pleaded by way of defence to a suit instituted in India. An exception to this rule is contained in i.e., in the case of a contract entered entered into in the State of Jammu and Kashmir or in a foreign country if a foreign rule of limitation has operated to extinguish the contract, and the parties were domiciled in the State of Jummu and Kashmir or in the foreign country during the period prescribed by such rule, then such rule can be pleaded as a defence to a suit instituted in India on such contract.

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COMPUTATION OF PERIOD OF LIMITATION
(Part III, Secs. 12 to 24).

'Period of limitation' means the period of limitation prescribed for any suit, appeal or application by the Schedule to the Act, and 'prescribed period' means the period of limitation computed in accordance with the provisions of the Limitation Act, 1963.

Exclusion of time

The Act makes specific provisions for exclusion of certain time in some cases for computation of the prescribed period *(i.e.,* period of limitation). These provisions are as follows :

1. *Exclusion of time in legal proceedings* (Sec. 12). The rules relating to exclusion of time in legal proceeding are as follows :

(1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

Example. A promissory note is executed on 10th July, 1991. The last date for filing the suit will be 10th July, 1994, the period of limitation in case of promissory notes being 3 years. The first day, *i.e.,* 10th July, 1991 will not be taken into account in computing the period of limitation.

In computing a calender month or year, it is sufficient to go from one month or year to the corresponding day in the next, and to exclude from computation the day from which the month or the year is calculated, so that two days of the same number are not included (*Debi Narain* v. *Ishan,* 13 C.L.R. 153).

(2) In computing the period of limitation for *(a)* an appeal, or *(b)* an application for leave to appeal, or *(c)* revision, or review of a judgment, the following periods shall be excluded—

(i) the day on which the period begins to run,

(ii) the day on which the judgment complained of was pronounced,

(iii) the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed, and

(iv) the time requisite for obtaining a copy of the judgment.

Time requisite for obtaining a copy. The word 'requisite' means 'properly required', and it throws upon the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default [*J.N. Surty* v. *Chettiar* A.I.R. (1928) P.C. 103]. The words 'requisite' and 'obtaining' means that some definite step should be taken by the appellant or the applicant himself towards the attainment of the copy [*Keshav Sugar Works* v. *R.C. Sharma,* A.I.R. (1951) All. 122].

The delay caused by the carelessness or negligence of the party in applying for a copy or in paying the money required for making the copy cannot be excluded from computation [*Parvati* v. *Bhola,* 12 All. 79].

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgement on which the decree or order is founded shall also be excluded.

(4)

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In computing the period of limitation for an application to set aside an award, the following periods shall be excluded—

(i) the day on which the period begins to run,

(ii) the time requisite for obtaining a copy of the award.

But in computing under Sec. 12 the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

2. *Exclusion of time in cases where leave to sue or appeal as a pauper is applied for* (Sec. 13). In computing the period of limitation prescribed for any suit or appeal in any case where an application for leave to sue or appeal as a pauper has been made and rejected, the time during which the applicant has been prosecuting in good faith his application for such leave shall be excluded.

The essential requisites of Sec. 13 are as follows :

(a) The applicant has made an application for leave to sue or appeal as a pauper.

(b) The application for leave has been rejected.

(c) The applicant has been prosecuting his application for leave in good faith.

If the above conditions are satisfied, the time lost in the prosecution of the application shall be excluded in computing the period of limitation.

Further the Court may, on payment of the Court fees prescribed for such suit or appeal, treat the suit or appeal as having the same force and effect as if the Court fees had been paid in the first instance.

3. *Exclusion of time of proceeding bona fide in Court without jurisdiction* (Sec. 14). In computing the period of limitation for any suit or application the time during which the plaintiff has been prosecuting with due diligence another civil proceedings, whether in a Court of first instance or of appeal or revision, against the defendant, shall be excluded. Such proceeding must, however, relate to the same matter in issue and must have been prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

The essential requisites for excluding the time spent in taking civil proceedings in a wrong Court are as follows :

(1) The proceeding which the plaintiff was prosecuting must be a civil proceeding.

(2) All the defendants in the earlier civil proceeding must be now parties to the present suit.

(3) The suit in which the plaintiff claims the benefit of the rule in Sec. 14 must relate to the same matter in issue as the former civil proceeding.

(4) The previous civil proceeding must have been prosecuted with due diligence and in good faith. According to Sec. 2 *(h)*, nothing shall be deemed to be done in good faith which is not done with due care and attention. It may be noted that the mistaken advice of a lawyer may be a sufficient cause for holding that the plaintiff was misdirected if he has acted with due diligence and good faith [*Madhavrao* v. *Ram Kishan*, A.I.R. (1958) S.C. 767]. When a

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lawyer in exercise of his professional functions prophesies that a particular Court is likely to entertain a particular suit, he or his client cannot be said to be acting in bad faith [*R.K. Janakiah Lehetty* v. *A.K. Mohan*, (1980) A.P. 41].

(5) The incapacity of the previous Court must have been due to *(a)* want of jurisdiction, or *(b)* other cause of a like nature [*Satyanarayananmurthy* v. *Maharaja of Pithapur, A.I.R.* (1939) Mad. 724].

In the absence of any of the above requisites, the plaintiff cannot take advantage of exclusion of time permitted by Sec. 14 [*Maqsood* v. *Harkishore* A.I.R. (1945) All. 377]. The Section must however be construed liberally [*Maneklal* v. *Shivalal*, A.I.R. (1939) Bom. 26]. Indulgence should be granted under this Section only in case where an error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution [*Maya* v. *Udham*, A.I.R. (1938) Lah. 708].

(6) The period which the rule under Sec. 14 permits to be excluded is :

(a) the time during which the earlier suit or application was pending or being made ;

(b) the day on which the suit or application was instituted ;

(c) the day on which the proceeding terminated ; and

(d) the period between the decision of the first Court and the disposal of an appeal therefrom, provided the latter was executed in good faith.

The principle underlying Sec. 14 is the protection against the bar of limitation to a person honestly doing his best to get his case tried on merits, but failing through the Court being unable to give him such trial [*Mathura Singh* v. *Bhawani Singh*, (1900) I.L.R. 22 All. 248 (F.B.)].

It may be noted that Sec. 14 has no application in the case of appeals.

For the purposes of Sec. 14 —

(a) in excluding the time during which a former civil proceeding was pending, they day on which that proceeding was instituted and the day on which it ended shall both be counted ;

(b) a plaintiff or an an applicant resisting an appeal shall be deemed to be prosecuting a proceeding ;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

4. *Exclusion of time in certain other cases* (Sec. 15). The Act makes the following provisions for exclusion of time in certain cases other than those contained in Secs. 12 to 14.

(1) In computing the period of limitation for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the following periods shall be excluded —

(a) the time of continuance of the injunction or order,

(b) the day on which it was issued or made, and

(c) the day on which it was withdrawn.

A party seeking to take advantage of Sec. 15 must show that he was earlier restrained by an order from making the prayer, which he is now making. If he could have done earlier what he is trying to do now, he cannot invoke the

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application of Sec. 15 [*Triveni Prasad Dhandhania* v. *Sita Ram Poddar & Others*, A.I.R. (1980) Pat. 234].

(2) In computing the period of limitation for any suit of which notice has been given, or for which the previous consent or sanction of the Government or any other authority is required, in accordance with the requirements of any law for the time being in force, the period of such notice or, as the case may be, the time required for obtaining such consent or sanction shall be excluded. However in excluding the time required for obtaining the consent or sanction of the Government or any other authority, the date on the which the application was made for obtaining the consent or sanction and the date of receipt of the order of the Government or other authority shall both be counted.

(3) In computing the period of limitation for any suit or application for execution of a decree by any receiver or interim receiver appointed in proceedings for the adjudication of a person as an insolvent or by any liquidator or provisional liquidator appointed in proceedings for the winding up of a company, the period beginning with the date of institution of such proceedings and ending with the expiry of 3 months from the date of appointment of such receiver or liquidator, as the case may be, shall be excluded.

(4) In computing the period of limitation for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

(5) In computing the period of limitation for any suit the time during which the defendant has been *absent* from India and from the territories outside India under the administration of the Central Government, shall be excluded.

This provision is attracted only when the cause of action has arisen in India [*Subramaniam* v. *Maruthamuthu*, A. I. R. (1944) Mad. 437].

The word 'absent' used includes a person who had never been present in India (*Maharaja* v. *Provincial bank*, 72 P.R. 1891). Even where the defendant pays occasional visits to India, Sec. 15 will apply (*Janki* v. *Manohar Lal*, 26 P.R. 1897). Where the plaintiff is ignorant of the return of the defendant to India, it does not affect the running of limitation (*Mahamud* v. *Claragene*, 2 N.W.P. 173).

The rule contained in Para (5) applies only to defendants, and in favour of plaintiffs so as to prevent limitation from running against the latter. It is, however, not applicable in favour of the defendant who has been absent from India and wants to set aside proceedings in execution taken against him in his absence. Further, it applies to suits only and not to appeals or applications.

Effect of death on or before the accrual of the right to sue (Sec. 16)

A person who has a right to institute a suit or make an application may die before the right accrues, or a right to institute a suit or make an application may accrue only on the death of a person. In such a case the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting such suit or making such application. The same rule applies to the person against whom, if he were living, a right to institute a suit or make an application would have accrued dies before the right accrues, or where a right to

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institute a suit or make an application against any person accrues on the death of such person.

The principle underlying Sec. 16 is that there can be no cause of action until there is a party capable of suing or be sued, and until there is a cause of action there can be no question of the law of limitation coming into operation. But if the cause of action has already accrued and time has once begun to run, no subsequent disability or inanility to sue stops the running of time. Note the following case :

> *Palaniappa* v. *Vadamalai*, 18 I.C. 373. No trustee was appointed for a temple by the Committee authorised to appoint one for 24 years (from 1883 to 1907). The defendant had been in adverse possession (possession inconsistent with the right of the true owner) of trust before 1907, the year when the plaintiff was appointed trustee. *Held*, the defendant's adverse possession did not matter in law till 1907, and there could be no limitation running until there was a person in existence capable of suing.

Death before the right accrues. The death must occur before the right to sue or make an application accrues. If the right accrues in the lifetime of the deceased, limitation begins to run from the date of accrual (*Rhodes* v. *Smethurst*, 4 M. & W. 42).

Capable of suing. The expression ' capable of suing' is the equivalent of 'not being under legal disability to sue'. It has nothing to do with incapacity arising from want of means or physical capacity to go through litigation. Sec. 6 lays down the legal disabilities that incapacitate a person from suing [*Rivett Carnce* v. *Goculdas*, A.I.R. (1937) Sindh 318]. Secs. 16 and 6 must therefore be read together.

Sec. 16 does not apply to suits—

(a) to enforce rights of pre-emption, or

(b) for the possession of immovable property, or

(c) for the possession of a hereditary office.

Effect of fraud or mistake (Sec. 17)

Sometimes a person may, by the exercise of fraud, keep away some other person from the knowledge that he has a right to file a suit for the enforcement of the right. In such a case if he fraudulently appropriates the property of the other person, he must know that no time will secure to him the fruits of his dishonesty. Limitation will be held in abeyance, and even his children's childern will be compelled to restore the property which he has acquired fraudulently. Limitation in such a case will be computed from the time when such fraud became known to the person defrauded.

Sec. 17 which deals with this point provides thus : Where, in the case of any suit or application for which a period of limitation is prescribed by this Act—

(a) the suit or application is based upon the fraud of the defendant or respondent or his agent ; or

(b) the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of any such person as aforesaid ; or

(c) the suit or application is for relief from the consequences of a mistake ; or

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(d) any document necessary to establish the right of the plaintiff or applicant had been fraudulently concealed from him ;

The period of limitation shall not begin to run until the plaintiff or applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it. Likewise, where any document necessary to establish the right of the plaintiff or applicant has been fraudulently concealed from him, the period of limitation shall not begin to run until the plaintiff or the applicant first had the means of producing the concealed document of compelling its production.

The basic principle behind Sec. 17 is that a party wrongfully concealing material facts and thereby preventing discovery of his fraud or wrong or the fact that a cause of action has acrued against him, cannot be allowed to take advantage of his own wrong by setting up the statute of limitation [*Raneegunge Coal Assn.* v. *Tata Iron & Steel Co.*, A.I.R. (1929) Bom.119]. It should further be noted that Sec. 17 applies only when the plaintiff has been kept from the knowledge of his right to do a certain thing by fraud of the other party [*Golam Muzafar* v. *Goloke*, 25 I.C. 884]. Unless the knowledge of his right was fraudulently concealed from him, Sec. 17 has no application [*Gulam Ghouse Mohiuddin* v. *Ahmed Mohiuddin*, A.I.R. (1971) S.C. 2184].

The essential conditions for getting the advantage of suspension of limitation is case of fraud are as follows :

1. The cause of action of plaintiff has been concealed from the plaintiff by fraud.

2. The fraud has been committed by the defendant or a person through him or who claims under him. If the fraud has been committed by a third person, Sec. 17 shall not apply unless that person is an agent of the defendant.

3. The plaint is in time since the discovery of the fraud.

Sec. 17 is limited to suits and applications only. It does not apply to criminal cases (*Emperor* v. *Nageshappa*, 20 Bom. 543) or appeals.

Exceptions. No suit can be instituted or no application can be made to recover or enforce any charge against, or set aside any transaction affecting, any property in the following cases :

(i) in the case of fraud, where the property has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know, or have reason to believe, that any fraud had been committed, or

(ii) in the case of mistake, where the property has been purchased for valuable consideration subsequently to the transaction in which the mistake was made, by a person who did not know, or have reason to believe, that the mistake had been made, or

(iii) in the case of a concealed document, where the property has been purchased for valuable consideration by a person who was not a party to the concealment and, did not at the time of purchase know, or have reason to believe, that the document had been concealed.

Execution of decree or order. Where a judgment-debtor (one against whom judgment is given for a sum of money) has, by fraud or force, prevented the execution of a decree or order within the period of limitation, the Court may,

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on the application of the judgment-creditor made after the expiry of the said period, extend the period for execution of the decree or order. Such application must however be made within 1 year from the date of the discovery of the fraud or the cessation of force, as the case may be.

Effect of acknowledgement in writing (Sec. 18)

Sometimes a liability may be acknowledged by the party against whom the liability is alleged within the period of limitation. If this acknowledgement is made in writing, it would give rise to a fresh period of limitation (as prescribed by the Limitation Act) and it would run from the date of acknowledgement. The acknowledgement in no way extinguishes the original cause of action nor does it create a new one. It only shows that the original cause of action still subsists and the claim remains unsatisfied.

Sec. 18 contains the rule of law to the above effect. Sometimes before the expiration of the prescribed period for a suit or application in respect any property or right, an acknowledgement of liability in respect of such property or right may be made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability. In such a case, a fresh period of limitation shall be computed from the time when the acknowledgement was so signed.

Example. A borrows money from B on 1st January, 1991. The debt will become time-barred after the expiry of 3 years. On 1st July, 1993 *A.* writes a letter to *B*, saying that he is sorry that he has not been able to pay and now promises to pay the full amount within 3 months. A fresh period of limitation (3 years) shall start from 1st July, 1993.

The underlying priniciple as laid down by Sec. 18 is that the statutory bar to a claim would fail when the existence of the claim or right is acknowledged from time to time by the person against whom it is made.

Where the writing containing the acknowledgement is undated, oral evidence may be given of the time when it was signed ; but subject to the provisions of the Indian Evidence Act, 1872, oral evidence of its contents shall not be received.

The word 'signed' as used in Sec. 18 means signed either personally or by an agent duly authorised in this behalf.

The essential requisites of a valid acknowledgement under Sec. 18 are as follows :

(1) The acknowledgement must have made before the expiration of the prescribed period of limitation. Where a claim becomes time-barred, a mere acknowledgement or payment without a new promise to pay will not revive the claim so as to provide a fresh starting point. This, in other words, means that the acknowledgement concerned must contain an admission of a subsisting liability [*V. C. Pillai* v. *Siranthanu Pillai*, A.I.R. (1979) S.C. 1937].

(2) The acknowledgement must have been made by the party against whom the right is claimed or by person through whom he derives his title or liability.

(3) The acknowledgement must be in writing. However, if the acknowledgement is undated, oral evidence may be given of the time when it was signed.

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The acknowledgement must have been signed by the party against whom the right is claimed or by any person through whom he derives his title or liability. A telegram acknowledging a debt does not constitute a sufficient acknowledgement under Sec. 18. The reason is that telegrams are not signed by the persons sending them.

(5) The acknowledgement must be in respect of some liability or a particular property or right claimed in the suit or application [*Hukumat* v. *Nenumal*, A.I.R (1928) Sindh 45].

(6) The acknowledgement is not required to be made to the creditor or the person entitled to the property ; it may be made to any person, even to a stranger.

It is not necessary that an acknowledgement within Sec. 18 must contain an express or implied promise to pay or should amount to a promise to pay [*Subbarsadya* v. *Narsimha*, A.I.R. (1936) Mad 939]. What is necessary is that there should be an admission of the subsisting liability. If an admission is accompanied by a refusal to pay, its character as acknowledgement will not be affected. However an acknowledgement may be sufficient even though—

(i) it omits to specify the exact nature of the property or right, or

(ii) avers (to allege in pleading) that the time for payment, delivery, performance or enjoyment has not yet come, or

(iii) is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or

(iv) is coupled with a claim to set-off, or

(v) is addressed to a third person *(i.e.,* a person other than a person entitled to the property or right).

As regards payment of time-barred debts under Sec. 25 (3) of the Indian Contract. Act 1872, a promise to pay in writing may be made even after the limitation period ; but under Sec. 18 of the Limitation Act, 1963 an acknowledgement must be made before the expiration of the limitation period.

Effect of payment on account of debt or of interest on legacy (Sec. 19)

Sec. 19 deals with the effect of payment on account of a debt or interest on a legacy. It provides thus : Where payment *(a)* on account of a debt or *(b)* of interest on a legacy is made before the expiration of the prescribed period *(i)* by the person liable to pay the bebt or legacy, or *(ii)* by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. It further provides that, save in the case of payment of interest made before the 1st day of Jaunary, 1928, an acknowledgement of the payment must appear in the handwriting of, or in a writing signed by the person making the payment.

For the purposes of Sec. 19,—

(a) where a mortgaged land is in the possession of the mortagee, the receipt of the rent or produce of such land shall be deemed to be a payment ;

(b) 'debt' does not include money payable under a decree or order of a Court.

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The principle underlying Sec. 19 is that the payment (whose acknowledgement must be signed by the person making the payment or must be in his handwriting and which excludes oral testimony) implies an admission of a right and acknowledgement of a corresponding liability. Payment need not necessarily be in terms of money. It may be in any medium that the creditor may agree to accept.

Payment under Sec. 19 impliedly means part-payment. When a debt is partly paid, it amounts to an admission that the other part of the debt is still outstanding. This implies an acknowledgement of the liability to pay the outstanding balance. The part payment, therefore, gives a fresh start to limitation.

Difference between Secs. 18 and 19. Sec. 19 does not prevent the operation of Sec. 18 and the two Sections are not mutually exclusive. An acknowledgement under Sec.. 18 need not be addressed to the person entitled but a part-payment under Sec. 19 must be made only to the person entitled to payment (*Venkatakrishnaih* v. *Subbarayyudu*, 40 Mad. 98). Under Sec. 19, an acknowledgement of payment should appear in the handwriting of or be signed by the person making it whereas under Sec. 18, the person acknowledging must sign the acknowledgement [*Gazadhar* v. *Udiachand*, A.I.R. (1940) Nag. 354]. A subsisting liability is essential under Sec. 18 and that has to be in writing. Under Sec. 19 payment as well as a writing recording the same is necessary. Under Sec. 18, an acknowledgement of liability by a person liable to pay the debt operates only against the person acknowledging the debt and not against others who are also liable to pay the debt, whereas part-payment under Sec. 19 operates even against the others.

Effect of acknowledgement or payment by another person (Sec. 20)

The provisions in Sec. 20 are in the nature of an explanation to Secs. 18 and 19 [*Ram Kumar Pandey* v. *Hiralal*, *I.LR.* (1939) All. 258]. Sec. 20 merely supplements Secs. 18 and 19 as to the persons who can make acknowledgements. It does not by any means constitute an exception in the case of either Sec. 18 or Sec. 19 [*Naziruddin* v. *Ramanand*, A.I.R. (1948) Oudh 193].

Agent authorised in this behalf. The expression 'agent duly authorised in this behalf' in Secs. 18 and 19 shall, in the case of a person under disability, include his lawful guardian, committee (a person to whom the custody of the person or estate of a person under legal disability is committed or granted by the Court) or manager or an agent duly authorised by such guardian, committee or manager to sign the acknowledgement or make the payment. Thus an acknowledgement made by a lawful guardian of a minor or an idiot is valid and binds the minor or the idiot, as the case may be.

Acknowledgement by one of several persons. An acknowledgement signed by, or of a payment made by, or by the agent of one of several person (joint contractors, partners, executors or mortgagees) interested in the same property or debt is not binding on others. To put it differently, this means that a mere signing of an acknowledgement by one of several persons interested in the same property or debt does not necessarily of itself bind others, unless it is shown that he had authority, express or implied, to make the acknowledgement on behalf of himself and others. If, however, it is shown that he had authority, express or implied, then of course the acknowledgement will be binding on them all.

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The reason behind the above rule is that an acknowledgement and payment are the acts which make the period of limitation run afresh. It would, therefore, be unjust if the debtor is debarred from the right of pleading the statute of limitation due to the acts of a co-debtor or an agent unless due authority among co-debtors is established in which case alone an acknowledgement by one of several joint debtors will bind him and the others.

Exceptions. (1) An acknowledgement signed or a payment made in respect of any liability by or by, the duly authorised agent of, any limited owner of property who is governed by Hindu Law, shall be a valid acknowledgement or payment, as the case may be, against a reversioner succeeding to such liability.

(2) Where a liability has been incurred by or on behalf of a Hindu undivided family as such, an acknowledgement or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

Subsitution or addition of new plaintiff or defendant (Sec. 21)

Where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. But where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

Exceptions. The above rule shall not, however, apply to a case —

(a) where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit, or

(b) where a plaintiff is made a defendant or a defendant is made a plaintiff.

The reason beind these exceptions is that in such cases the newly added person steps into the shoes of the deceased or the assignor, as the case may be, and cause of action remains the original cause of action. No new considerations, therefore, arise in matters of limitation.

Continuing breaches and torts (Sec. 22)

In the case of a continuing breach of a contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. In such cases, a right to sue arises at every moment of the time during which the breach or tort continues.

'Tort', according to Sec. 2 *(m)*, means a civil wrong which is not excusively the breach of a contract or the breach of a trust.

Examples. (a) A lets out a bus to a school under a lease on the condition that during the continuance of the lease, the school shall maintain the bus in a perfect running condition. The school neglects to repair the bus. There is a continuing breach of contract. Every moment during which the breach continues, a fresh period of limitation begins to run.

(b) In a suit for the restitution of conjuagal rights, the wife (the defendant) contended that the suit was time-barred as she had been continuously refusing

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to return to her husband (the plaintiff) for over 20 years. The plaintiff contended that her refusal constituted a continuous wrong giving rise to a continuously recurring cause of action and that under the Limitation Act such suits were altogether exempt from the bar of limitation. *Held*, the refusal of the wife to live with her husband was a continuing wrong which gave rise to a fresh period of limitation at every moment of time during which the wrong continued. The present suit, therefore, was not barred by limitation [*Mst. Sahibzadi* v. *Abdul Gafur*, A.I.R. (1939) Lah. 454].

(c) The plaintiffs (Digambar Jains) had been worshipping certain charans (footprints) on the Parasnath hill. The defendants (Swetamber Jains) removed those charans and replaced them by charans of a different type obnoxious to the plaintiffs. *Held*, the action of the defendants was a continuing wrong (tort) in respect of which a fresh period of limitation began to run every moment of the day on which the wrong continued [*Hukam Chand* v. *Bahadur Singh*, A.I.R. (1933) P.C. 193].

A distinction may be noted between a continuing tort and the continuance of the injurious effects of a tort. The latter contemplates that there has been a legal injury once and its after-effects continue while the former contemplates that the act or omission causing infringement to some legal right is being repeated from day to day. Continuance of injurious effects of a tort does not give rise to a fresh cause of action whereas a continuing tort gives rise to a fresh cause of action at every moment during which the wrong continues.

Suits for compensation for acts not actionable without special damages (Sec. 23)

In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Example. A owns the surface of a field, *B* owns the subsoil. *B* digs coal thereout without causing any immediate apparent injury to the surface but at last the surface subsides. The period of limitation in this case shall be computed not from the day when the digging starts but from the time when the injury results.

The word 'act' used in Sec. 23. includes both acts of commission and omission (*Dwarkanath* v. *Corpn. of Calcutta*, 18 Cal. 91). The word 'injury' includes a legal injury [*Govind* v. *Rangnath*, A.I.R. (1930) Bom. 572].

Each separate specific injury caused by an act constitutes a fresh cause of action and separate period of limitation will run for each (*Mitchell* v. *D.M. Colliery Co.*, 14 Q.B.D. 125).

Computation of time mentioned in instruments (Sec. 24)

All instruments shall, for the purposes of the Limitation Act, be deemed to be made with reference to the Gregorian calendar (*i.e.*, the year beginning on 1st January and ending on 31st December).

Example. A makes a promissory note bearing 14th day of Baisakhi, Samvat 2047 (23rd April, 1990) as date, payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months (plus three days of grace in case of negotiable instruments) after date computed according to the Gregorian calender, *i.e.*, from 26th August, 1990.

Sec. 24 postulates of uniform adoption of Gregorian calendar so as to bring about uniformity as the various calenders in India divide the year in different manner [*Venkta Subramanya* v. *Yalla Bhairava*, A.I.R. (1927) Mad. 917].

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ACQUISITION OF OWNERSHIP BY POSSESSION
(Part IV, Secs. 25 to 27)

Acquisition of easements by prescription (Sec. 25)

According to Sec. 25, the right of easement by prescription (the vesting of a right by lapse of time) can be acquired as follows :

(1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement and as of right without interruption and for 20 years, the right to such access and use of light or air other easement shall be absolute and indefeasible (that cannot be annulled or avoided or undone).

(2) Where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for 20 years, the right to such way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Example. (a) A suit is brought in 1994 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right without interruption from 1st January, 1974 to 1st January 1994. The plaintiff is entitled to judgment.

(b) In a like suit the plaintiff shows that the right was peaceably enjoyed by him for 20 years. The defendant proves that plaintiff, on one occasion during the 20 years, had asked his leave to enjoy the right. The suit shall be dismissed.

The period of 20 years shall be taken to be a period ending within 2 years next before the institution of the suit wherein the claim to which such period relates is contested. Where property over which a right is claimed belongs to the Government, the period of 20 years is extended to 30 years.

It should be noted that a title to an easement is not complete merely upon the effluxion of the period of 20 years. However long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought in question, the right is inchoate (not established) only.

Where a suit is pending, the period of 20 years' enjoyment must end within 2 years of the institution of the suit. Where this enjoyment has been interrupted and no suit brought within 2 years from interruption, the suit will fail.

The meaning of some of the words used in Sec. 25 may be noted.

Peaceably. In order to establish a right of easement, it is enough for the plaintiff to prove that he has been exercising the right without being obliged to resort to physical force himself at any time to exercise his right within 20 years, and also without the use of physical force by the defendant in his enjoyment of such right (*Muthu Gounder* v. *Anantha*, 29 M.L.J. 685).

'Peaceably enjoyed' connotes quiet possession without let or hinderance.

Openly enjoyed. The word '*openly*' means that the enjoyment has, from the very beginning, been visible and manifest, and not furtive or secret [*Ram*

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Sarup v. *Abdul Huq*, A.I.R. (1931) Lah. 395]. It is sufficient if the air and light have been enjoyed peaceably, but the other easements must have been enjoyed openly and peaceably.

As of right. This term does not mean 'rightfully' but enjoyment by a person in assertion of a right for 20 years or more as if he had been the true owner without any leave of, or licence from, any one (*Sunder* v. *Nag*, 4. P.R. 1917). The burden lies on the plaintiff to show that he has been enjoying the easement as of right (*Barada* v. *Sreenath*, 18 I.C. 211).

As an easement. A right of ownership and a right of easement are incompatible. If a person claims a site as owner, he cannot claim a right of way or user or watercourse over the same as an easement (*Chunilal* v. *Managaldas*, 15 Bom. 592).

The words 'as an easement' in Sec. 25 show that the acts relied upon as evidence of the existence of a right must be done by some person upon the land of another.

Without interruption. It means the 20 years' enjoyment must be without any obstruction on the part of the person against whom the easement is claimed. Interruption within the meaning of Sec, 25 is an actual discontinuance of the possession or cessation of enjoyment by reason of an obstruction by the act of some person other than the claimant and such obstruction is submitted to or acquiesced in for 1 year after the claimant has notice thereof and of the person making or authorising the same to be made.

Exclusion in favour of reversioner of servient tenement (Sec. 26)

There may be a case where any land or water upon, over or from, which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or in terms of years exceeding 3 years from the granting thereof. In such a case the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of 20 years. This can, however, be the case if the claim is, within 3 years next after the determination of such interest or term, resisted by the person entitled on such determination to the said land or water.

Extinguishment of right to property (Sec. 27)

At the determination of the period prescribed by the Limitation Act. 1963 for instituting a suit for possession of any property, the right to such property shall be extinguished. Thus if a person who could have sued for the possession of property does not institute a suit for possession and allows the period of limitation to expire, his right to such property is destroyed and is not revived even if he again acquires its possession. This means 'adverse possession' of a property by a wrong-doer for 20 years not only bars the remedy of the true owner but confers a good title upon the wrong-doer. 'Adverse possession' means a possession by a person holding the property on his own behalf or on behalf of some other person, other than the owner, the true owner having a right to immediate possession. It is, in other words, actual possession in the absence of possession by the rightful owner, and without lawful title.

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THE SCHEDULE TO THE ACT

PERIODS OF LIMITATION

[*See* Secs. 2 *(j)* and 3]

FIRST DIVISION—SUITS

Description of suit	*Period of limitation*	*Time from which period begins to runs*
1	2	3
PART I — SUITS RELATING TO ACCOUNTS		
1. For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.	Three years	The close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account.
2. Against a factor for an account.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where any such demand is made, when the agency terminates.
3. By a principal against his agent for movable property received by the latter and not accounted for.	Three years	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.
4. Other suits by principals against agents for neglect or misconduct.	Three years	When the neglect or misconduct becomes known to the plaintiff.
5. For an account and a share of the profits of a dissolved partnership.	Three years	The date of the dissolution
PART II—SUITS RELATING TO CONTRACTS		
6. For a seaman's wages.	Three years	The end of the voyage during which the wages are earned.
7. For wages in the case of any other person.	Three years	When the wages accrue due.
8. For the price of food or drink sold by the keeper of a hotel, tavern or lodging house.	Three years	When the food or drink is delivered.
9. For the price of lodging	Three years	When the price becomes payable.
10. Against a carrier for compensation for losing or injuring goods.	Three years	When the loss or injury occurs.
11. Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	Three years	When the goods ought to be delivered.

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1	2	3
12. For the hire of animals, vehicles, boats or household furniture.	Three years.	When the hire becomes payable.
13. For the balance of money advanced in payment of goods to be delivered.	Three years	When the goods ought to be delivered.
14. For the price of goods sold and delivered where no fixed period of credit is agreed upon.	Three years	The date of delivery of the goods.
15. For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years	When the period of credit expires.
16. For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given.	Three years	When the period of the proposed bill elapses.
17. For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years	The date of the sale.
18. For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years	When the work is done.
19. For money payable for money lent.	Three years	When the loan is made.
20. Like suit when the lender has given a cheque for the money.	Three years	When the cheque is paid.
21. For money lent under an agreement that it shall be payable on demand.	Three years	When the loan is made.
22. For money deposited under an agreement that it shall be payable on demand, including money for a customer in the hands of his banker so payable.	Three years	When the demand is made.
23. For money payable to the plaintiff for money paid for the defendant.	Three years	When the money is paid.

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1	2	3
24. For money payable by the defendant to the plaintiff for money received by the defendant, for the plaintiff's use.	Three years	When the money is received.
25. For money payable for interest upon money due from the defendant to the plaintiff.	Three years	When the interest becomes due.
26. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.
27. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years	When the time specified arrives or the contingency happens.
28. On a single bond, where a day is specified for payment.	Three years	The day so specified.
29. On a single bond, where no such day is specified.	Three years	The date of executing the bond.
30. On a bond subject to a condition.	Three years	When the condition is broken.
31. On a bill of exchange or promissory note payable at a fixed time after date.	Three years	When the bill or note falls due.
32. On a bill of exchange payable at sight, or after sight but not at a fixed time.	Three years	When the bill is presented.
33. On a bill of exchange accepted payable at a particular place.	Three years	When the bill is presented at that place.
34. On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years	When the fixed time expires.
35. On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years	The date of the bill or note.

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1	2	3
36. On a promissory note or bond payable by instalments.	Three years	The expiration of the first term of payment as to the part then payable ; and for the other parts, the expiration of the respective terms of payment.
37. On a promissory note or bond payable by instalments which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years	When the default is made unless where the payee or obligee waives the benefit of the provision and then when fresh default is made in respect of which there is no such waiver.
38. On a promissory note given by the maker to a third peron to be delivered to the payee after a certain event should happen.	Three years	The date of the delivery to the payee.
39. On a dishonoured foreign bill where protest has been made and notice given.	Three years	When notice is given.
40. By the payee against the drawer of a bill of exchange which has been dishonoured by nonacceptance.	Three years	The date of the refusal to accept.
41. By the acceptor of an accommodation bill against the drawer.	Three years.	When the acceptor pays the amount of the bill.
42. By a surety against the principal debtor	Three years	When the surety pays the creditor.
43. By a surety against a cosurety.	Three years	When the surety pays anything in excess of his own share.
44. *(a)* On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years	The date of the death of the deceased, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years	The date of the occurrence causing the loss, or where the claim on the policy is denied, either partly or wholly, the date of such denial.
45. By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years	When the insurers elect to avoid the policy.

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1	2	3
46. Under the Indian Succession Act, 1925, Sec. 360 or Sec. 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years	The date of the payment or distribution.
47. For money paid upon an existing consideration which afterwards fails.	Three years	The date of the failure.
48. For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	Three years	The date of the payment in excess of the plaintiff's own share.
49. By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years	When the right to contribution accrues.
50. By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years	The date of the payment.
51. For the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years	When the profits are received.
52. For arrears of rent	Three years	When the arrears become due.
53. By a vendor of immovable property for personal payment of unpaid purchase-money.	Three years	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.
54. For specific performance of a contract.	Three years	The date fixed for the performance, or if no such date is fixed when the plaintiff has notice that performance is refused.
55. For compensation for the breach of any contract, express or implied, not herein specially provided for.	Three years	When the contract is broken or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs or (where the breach is continuing) when it ceases.

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1	2	3
	PART III — SUITS RELATING TO DECLARATIONS	
56. To declare the forgery of an instrument issued or registered.	Three years	When the issue or registration becomes known to the plaintiff.
57. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Three years	When the alleged adoption becomes known to the plaintiff.
58. To obtain any other declaration.	Three years	When the right to sue first accrues.
	PART IV— SUITS RELATING AND INSTRUMENTS	
59. To cancel or set aside an instrument or decree or for the recission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first becomes known to him.
60. To set aside a transfer of property made by the guardian of a ward—		
(a) by the ward who has attained minority ;	Three years	When the ward attains majority.
(b) by the ward's legal representative—		
(i) when the ward dies within three years from the date of attaining majority ;	Three years	When the ward attains majority.
(ii) when the ward dies before attaining majority.	Three years	When the ward dies.
	PART V — SUITS RELATING TO IMMOVABLE PROPERTY	
61. By a mortagagor—		
(a) to redeem, or recover, possession of immovable property mortaged ;	Thirty years	When the right to redeem or to recover possession accrues.
(b) to recover possession of immovable property mortgaged and afterwards transferred by the mortgagee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
(c) to recover surplus collections received by the mortgagee after the mortgage has been satisfied.	Three years	When the mortgagor reenters on the mortgaged property.
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	Twelve years	When the money sued for becomes due.

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1	2	3
63. By a mortgagee—		
(a) for foreclosure.	Thirty years	When the money secured by the mortgage becomes due.
(b) for possession of immovable property mortgaged.	Twelve years	When the mortgagee becomes entitled to possession.
64. For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession
65. For possession of immovable property or any interest therein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.
66. For possession of immovable property when the plaintiff has become entitled to possession by reason of any foreiture or breach of condition.	Twelve years	When the forfeiture is incurred or the condition is broken.
67. By a landlord to recover possession from a tenant.	Twelve years	When the tenancy is determined.
PART VI— SUITS RELATING TO MOVABLE PROPERTY		
68. For specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion.	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
69. For other specific movable property.	Three years	When the property is wrongfully taken.
70. To recover movable property deposited or pawned from a depositary or pawnee.	Three years	The date of refusal after demand.
71. To recover movable property deposited or pawned, and afterwards bought from the depositary, or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.
PART VII—SUITS RELATING TO TORT		
72. For compensation of doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends.	One year	When the act or omission takes place.

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1	2	3
73. For compensation for false imprisonment.	One year	When the imprisonment ends.
74. For compensation for a malicious prosecution	One year	When the plaintiff is acquitted or the prosecution is otherwise terminated.
75. For compensation for libel.	One year	When the libel is published.
76. For compensation for slander.	One year	When the words are spoken or, if the words are not actionable in themselves, when the special damage complained of results.
77. For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year	When the loss occurs.
78. For compensation for inducing a person to break a contract with the plaintiff.	One year	The date of the breach.
79. For compensation for an illegal, irregular or excssive distress.	One year	The date of the distress.
80. For compensation for wrongful seizure of movable property under legal process.	One year	The date of the seizure.
81. By executors, administrators or representatives under the Legal Representatives' Suits Act, 1855.	One year	The date of the death of the person wronged.
82. By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855.	Two years	The date of the death of the person killed.
83. Under the Legal Representatives' Suits Act, 1855 against an executor, an administrator or any other representative.	Two years	When the wrong complained of is done.
84. Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years	When the conversion first becomes known to the person injured thereby.
85. For compensation for obstructing a way or a watercourse.	Three years	The date of the obstruction.
86. For compensation for diverting a watercourse.	Three years	The date of the diversion.

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1	2	3
87. For compensation for trespass upon immovable properly.	Three years	The date of the trespass.
88. For compensation for infringing copyright or any other exclusive privilege.	Three years	The date of the infringement.
89. To restrain waste	Three years	When the waste begins.
90. For compensation for injury caused by an injunction wrongfully obtained.	Three years	When the injunction ceases.
91. For compensation— *(a)* for wrongfully taking or detaining any specific movable property lost, or acquired by theft, or dishonest misappropriation or conversion ;	Three years	When the person having the right to the possession of the property first learns in whose possession it is.
(b) for wrongfully taking or injuring or wrongfully detaining any other specific movable property.	Three years	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.
PART VIII— SUITS RELATING TO TRUSTS AND TRUST PROPERTY		
92. To recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
93. To recover possession of movable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.
94. To set aside a transfer of immovable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years	When the transfer becomes known to the plaintiff.
95. To set aside a transfer of movable property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the transfer becomes known to the plaintiff.

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96. By the manager of a Hindu, Mulsim or Buddhist religious or charitable endowment to recover possession of movable or immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The date of date of death, resignation or removal of the transferor or the date of appointment of the plaintiff as manager of the endowment, whichever is later.
PART IX —SUITS RELATING TO MISCELLANCEOUS MATTERS		
97. To enforce a right of pre-emption whether the right is founded on law or general usage or on special contract.	One year	When the purchaser takes under the sale sought to be impeached, physical possession of the whole or part of the property sold, or, where the subject-matter of the sale does not admit of physical possession of the whole or part of the property, when the instrument of sale is registered.
98. By a person against whom an order referred to in rule 63 or in rule 103 of Order XXI of the Code of Civil Procedure, 1908 or an order under Sec. 28 of the Presidency Small Cause Courts Act, 1882 has been made, to establish the right which he claims to the property comprised in the order.	One year	The date of the final order.
99. To set aside a sale by a civil or revenue Court, or a sale for arreas of Government revenue or for any demand recoverable as such arrears.	One year	When the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought.
100. To alter or set aside any decision or order of a civil Court in any proceeding other than a suit or any act or order of an officer of Government in his official capacity.	One year	The date of the final decision or order by the Court or the date of the act or order of the officer, as the case may be.
101. Upon a judgment including a foreign judgment, or a recognisance.	Three years	The date of the judgement or recognisance.

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1	2	3
102. For property which the plaintiff has conveyed while insane.	Three years	When the plaintiff is restored to sanity and has knowledge of the conveyance.
103. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years	The deate of the trustee's death or if the loss has not then resulted, the date of the loss.
104. To establish a periodically recurring right.	Three years	When the plaintiff is first refused the enjoyment of the right.
105. By a Hindu for arrears of maintenance.	Three years	When the arrears are payable.
106. For a legacy or for a share of a residue bequeathed by a testator of for a distributive share of the property of an intestate against an executor or an administrator or some other person legally charged with the duty of distributing the estate.	Twelve years	When the legacy or share becomes payable or deliverable.
107. For possession of a hereditary office. *Explanation*—A hereditary office is possessed when the properties thereof are usually received, or (if there are no properties) when the duties thereof are usually performed.	Twelve years	When the defendant takes possession of the office adversely to the plaintiff.
108. Suit during the life of a Hindu or Muslim female by a Hindu or Muslim who, if the female died at the date of insituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.	Twelve years	The date of the alienation.
109. By a Hindu governed by Mitakshara law to set aside his father's alienation of ancestral property.	Twelve years	When the alienee takes possession of the property.
110. By a person excluded from a joint family property to share therein.	Twelve years	When the exclusion becomes known to the plaintiff.

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111. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.
112. Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu and Kashmir.	Thirty years	When the period of limitation would begin to run under this Act against a like suit by a private person.
PART X— SUITS FOR WHICH THERE IS NO PRESCRIBED PERIOD		
113. Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

SECOND DIVISION—APPEALS

Description of appeal	*Period of limitation*	*Time from which period begins to run*
114. Appeal from an order of acquital,—		
(a) under Sec. 417 (1) or (2) of the Code of Criminal Procedure, 1898.	Ninety days	The date of the order appealed from.
(b) under Sec. 417 (3) of that Code.	Thirty days	The date of the grant of special leave.
115. Under the Code of Criminal Procedure, 1898,—		
(a) from a sentence of death passed by a Court of Session or by a High Court in the exercise of its original criminal jurisdiction.	Thirty days	The date of the sentence.
(b) from any other sentence or any order not being an order of acquittal		
(i) to the High Court,	Sixty days	The date of the sentence or order.
(ii) to any other court.	Thirty days	The date of the sentence or order
116. Under the Code of Civil Procedure, 1908—		
(a) to a High Court from any decree or order ;	Ninety days	The date of the decree or order.

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(b) to any other Court from any decree or order.	Thirty days	The date of the decree or order.
117. From decree or order of any High Court to the same Court.	Thirty days	The date of the decree or order.

THIRD DIVISION—APPLICATIONS

Description of appeal	*Period of limitation*	*Time from which period begins to run*
PART 1— APPLICATIONS IN SPECIFIED CASES		
118. For leave to appear and defend a suit under summary procedure.	Ten days	When the summon is served.
119. Under the Arbitration Act, 1940—		
(a) for the filing in Court of an award ;	Thirty days	The date of service of the notice of the making of the award.
(b) for setting aside an award or getting an award remitted for reconsideration.	Thirty days	The date of the service of the notice of the filing of the award.
120. Under the Code of Civil Procedure, 1908, to have the legal representative of a deceased plaintiff or appellant or of a deceased defendant or respondent, made a party.	Ninety days	The date of the death of the plaintiff, appellant, defendant or respondent, as the case may be.
121. Under the same Code for an order to set aside an abatement.	Sixty days	The date of abatment.
122. To restore a suit or appeal or application for review or revision dismissed for default of appearance or for want of prosecution or for failure to pay costs of service of porcess or to furnish security for costs.	Thirty days	The date of dismissal.
123. To set aside a decree passed *ex parte* or to re-hear an appeal decreed or heard *ex parte*.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.
124. For a review of judgment by a Court other than the Supreme Court.	Thirty days	The date of the decree of the decree or order.
125. To record an adjustment or satisfaction of a decree.	Thirty days	When the payment or adjustment is made.

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126. For the payment of the amount of a decree by instalments.	Thirty days	The date of the decree.
127. To set aside a sale in execution of a decree, including any such application by a judgment-debtor.	Thirty days	The date of the sale.
128. For possession by one dispossessed of immovable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree.	Thirty days	The date of the dispossession.
129. For a possession after removing resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree.	Thirty days	The date of resistance or obstruction.
130. For leave to appeal as a pauper—		
(a) to the High Court;	Sixty days	The date of the decree appealed from.
(b) to any other Court.	Thirty days	The date of the decree appealed from.
131. To any Court for the exercise of its powers of revision under the Code of Civil Procedure, 1908, or the Code of Criminal Procedure, 1973.	Ninety days	The date of the decree or order of sentence sought to be revised.
132. To the High Court for a certificate of fitness to appeal to the Supreme Court under Article 132 (1), Article 133 or Article 134 (1) *(c)* of the Constitution or under any other law for the time being in force.	Sixty days	The date of the decree, order or sentence.
133. To the Supreme Court for special leave to appeal—		
(a) in a case involving death sentence ;	Sixty days	The date of the judgment, final order or sentence.
(b) In a case where leave to appeal was refused by the High Court ;	Sixty days	The date of the order of refusal.
(c) in any other case.	Ninety days	The date of the judgment or order.
134. For delivery of possession by a purchaser of immovable property at a sale in execution of a decree.	One year	When the sale becomes absolute.

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1	2	3
135. For the enforcement of a decree granting a mandatory injunction.	Three years	The date of decree or where a date is fixed for performance, such date.
136. For the execution of any decree (other than a decree granting a mandatory injunction) or order of any Civil Court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, when default in making the payment or delivery in respect of which execution is sought, takes place : Provided that an application for the enforcement or execution of a decree granting a perpetual injunction shall not be subject to any period of limiation.

PART II— OTHER APPLICATIONS

137. Any other application for which no period of limitation is provided elsewhere in this Division.	Three years	When the right to apply accrues.

TEST QUESTIONS

1. What is the object of the Law of Limitation ?
2. "Limitation bars enforcement of a claim but does not extinguish it." Comment. *(C.S.E. June 1990)*
3. The law of Limitation bars the remedy, but does not extinguish the right. *(C.S.E. June 1992)*
4. "The plea of limitation is by no means a generally dishonourable defence, it might often be a righteous defence." Critically examine this statement.
5. What is 'bar of limitation' ? Is Court of Appeal bound to dismiss a suit barred by limitation even if the defendant does not raise the plea of limitation ? Explain the meaning of the concept 'time-barred.' *(C.S.E. June 1987)*
6. When can an appeal or application be admitted after the period of limitation ?
7. What remedy does the Limitation Act, 1963 provide when period of limitation prescribed for a suit expires on a day when the Court is closed ?
8. Can a Court grant extension of the period of limitation ? If so under what circumstances ? Can this period be extended in case of suits ?
9. What is legal disability under the Limitation Act, 1963 ? How is the period of limitation computed in case of a person under legal disability ?
10. What is the effect of minority on the question of limitation for a suit ?
11. "When once time has begun to run, no subsequent disability or inability to sue stops it." Explain and illustrate.
12. "No suit against a person in whom property has been vested in trust for a specific purpose shall be barred by any length of time." Discuss.

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13. What period is exculded while computing the period of limitation ?
(C.S.E. December 1992)

14. Explain the rule in regard to exculsion of time of proceedings prosecuted *bona fide* in a Court without jurisdiction.

15. State briefly the cases is which limitation *(a)* is suspended, *(b)* is extended, *(c)* does not run at all.

16. What is the effect of *(a)* the death of the plaintiff or defendant before the right to sue accrues, *(b)* fraud or mistake on the period of limitation prescribed for a suit ?

17. How is the period of limitation computed in cases of fraud or mistake ?

18. What is the effect of acknowledgement of a liability on period of limitation ?

19. What are the requisites of a valid acknowledgement of a liability in giving a fresh start of limitation ?

20. What is the effect of substituting or adding a new plaintiff or defendant in a pending suit with regard to limitation ?

21. Discuss the provisions of the Limitation Act, 1963 retating to *(a)* a continuing tort, and *(b)* a continuing breach of a contract ?

22. How is right of easement acquired under the Limitation Act, 1963 ? When does it become absolute and indefeasible ?

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *A* sold and delivered goods to *B* on 1st January 1990. He files a suit for the recovery of price on 10th January 1993 and prays for condonation of delay in filing the suit beyond the period of limitation. Can the Court condone the delay ?

[**Hint :** No. Sec. 5 is not applicable to suits].

2. *A* was sentenced to rigorous imprisonment for two months for a criminal offence. After the expiry of the period of the sentence, he filed an appeal against his conviction and sentence and prayed for the condonation of the delay on the ground of imprisonment. Will the Court be justified in extending the period of limitation in this case ?

[**Hint :** Yes. Sec. 5].

3. *D* borrows Rs. 2,000 on the basis of a promissory note in August 1989 from a firm of which *A*, *B* and *C* are partners. *A* is a minor and *B* insane. *C* can give a valid discharge of the debt without the concurrence of *A* and *B*. In July 1993 *B* attains his majority and *B* regains his sanity, and then within a year, *A* ,*B* and *C* file a suit against *D* for the recovery of the debt. Is the suit maintainable ?

[**Hint :** No. Sec. 7].

4. *C* borrowed Rs. 1,000 from *A* on the basis of a promissory note. *A* died a month after the date of the loan leaving *B*, a minor, as his legal representative. *B* sued C for the money within a year of his attaining minority but more than 5 years after the date of the loan. Is the suit within time ?

[**Hint :** No. Sec. 9].

5. *A*, by creating a trust in favour of *B* for a specific purpose, transfers an immovable property to *C*, the trustee, in January, 1988. *B* claims the property to be his own in July, 1993. Can *B* sue to recover the trust property from *C* ?

[**Hint** : Yes. Sec. 10].

6. *A* accepted a promissory note drawn by *B* on 1st September, 1989. On 1st February, 1990, A filed a suit against *B* for a declaration that the promissory note was not binding upon him as it had been obtained from him by fraud. *A* obtained an *interim* injunction against *B* restraining *B* from suing him. On 1st June, 1990, *A*'s suit was dimissed and *interim* injunction vacated. On 1st January, 1993. *B* filed a suit against *A* on the said promissory note. *A* pleaded limitation. Will he succeed in his defence ?

[**Hint** : Yes. Sec. 15].

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7. *A* accepted a promissory note in favour of *B* on 1st January, 1987. On 7th February, 1990 *A* acknowledged the debt in writing under his signature. On 4th April, 1990 *B* filed a suit for recovery of the amount of the promissory note. Is the suit in time ?

[Hint : No, as the acknowledgement has not come before the expiry of the period of limitation. Sec. 18].

8. On 1st July, 1990 *A* lent a sum of money to *B* and *C*. On 1st July 1993, he added *C* as a co-defendant in the suit. Is the suit barred ? If so, aginst whom ?

[Hint : The suit is barred against *C* and not against *B*. Sec. 21].

9. *A* wrongfully occupies *B's* property. From what time will the limitation start ?

[Hint : Refer to Sec. 22].

10. *A* owns the surface of a field and *B* owns the sub-soil. *B* digs coal from the sub-soil without causing any immediate injury to the surface, but after some time the surface subsides. From what time will the limitation start ?

[Hint : From the time of subsidence. Sec. 23].

11. What is the limitation period prescribed under the Limitation Act, 1963 for filing a suit in the following cases ?

(1) for money payable for money lent ;

(2) for specific performance of a contract ; and

(3) for an appeal against a sentence of death passed by a Court of Session or by a High Court in the exercise of its original criminal jurisdiction.

[Hint : (1) 3 years ; (2) years ; (3) 30 days].

12. A custom officer wishes to appeal in the Supreme Court against the judgment of the High Court. He could obtain the certified copy of the judgment of the High Court after a period of 8 months whereas time of limitation to file such appeal is 90 days. Is the appeal barred by limitation ? Give reasons. *(C.S.E. June 1988)*

[Hint : No. Sec. 12].

13. What are the periods of limitation in respect of :

(1) suits relating to contract ; (2) suits relating to movable property ; (3) suits relating to possession of immovable property mortgaged ; (4) Siuts for arrerrs of rent ; (5) suits for an account and a share of the profits of a dissolved partnership ? *(C.S.E. December 1989)*

[Hint ; (1) 3 years ; (2) 3 years ; (3) 30 years ; (4) 3 years ; (5) 3 years].

14. Ram owes money to Shyam against Bill No. 1687 dated 1st March 1986—credit period 2 months. He makes only part payment on 6th April, 1988. Shyam wants to file a suit for recovery of the balance of the amount on 1st April 1989. Advise Shyam about the limitation period to file the suit in the present case. *(C.S.E. June 1991; Modified version in December 1991)*

[Hint : A fresh period of limitation (3) years, starts from 6th April, 1988. Shyam can therefore file the suit (Sec. 19)].

15. *A*, advanced a loan of Rs. 10,000 to *B*. Before the expiry of the period of limitation for filing a suit for the recovery of this loan, *B* gave a letter duly signed by him to *A* in which *B* stated that he was indebted to *A* for Rs. 10,000, but that he will not repay that debt. Can this letter be treated an acknowledgement ? *(C.S.E., December 1992)*

[Hint : Yes (Sec. 18)].

16. An appeal has to be filed in the High Court within the period of limitation which is 90 days from the date of decree. The decree was passed on 6.1.1990. Application for certified copies of the judgment decree was made on 28.10.1990 and the certified copies were ready for delivery on 23.2.1990, but the delivery thereof was taken on 26.2.1990. What is the last date of limitation for filing the appeal ? *(C.S.E. June 1993)*

[Hint : The appeal is time-barred. Sec. 12].

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11

The Indian Trusts Act, 1882

The Act was passed to define and amend the law relating to private trusts and trustees. It came into force on the first day of March 1882 (Sec. 1, Para 1).

Extent of the Act

The Act extends to the whole of India except the State of Jammu and Kashmir and the Andaman and Nicobar Islands ; but the Central Government may, from time to time, by notification in the Official *Gazette*, extend it to the Andaman and Nicobar Islands or to any part thereof (Sec. 1, Para 2).

Applicability of the Act

The Act deals with the law relating to private trusts and trustees. It does not apply to—

(i) public trusts, or

(ii) public or private religious or charitable endowments, or

(iii) trusts to distribute prizes taken in war among the captors, or

(iv) trusts created before the passing of the Act.

The Act also does not affect—

(a) the rules of Muhammadan Law as to *waqf*, or

(b) the mutual relations of the members of an undivided family as determined by any customary or personal law (Sec. 1, Para 3).

Sec. 2 is the repealing Section.

Reference to Sections

The reference to Sections in this Chapter, unless otherwise indicated, is to the Indian Trusts Act, 1882.

DEFINITIONS
(Sec. 3)

Trust. A 'trust' is *(i)* an obligation annexed to the ownership of property, and *(ii)* arising out of a confidence *(iii)* reposed in and accepted by the owner, or declared and accepted by him, *(iv)* for the benefit of another, or of another and the owner.

Examples. (a) A transfers his house property to *T* for the maintenance of *B*. In this case, *T* becomes the owner of the property but he is under an obligation to use the property for the maintenance of *B*. The obligation arises out of a confidence that was reposed in and accepted by *T*.

(b) T, the owner of certain properties, declares that such properties shall in future be used by him for the maintenance of *B* and an annuity for himself and appoints

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himself as the trustee. T who was formerly the absolute owner becomes the trustee of the property.

The person who reposes or declares the confidence is called the *author of the trust* or the *settlor*. The person who accepts the confidence is called the *trustee*. The person for whose benefit the confidence is accepted is called the *beneficiary* or *cestui que trust*. The subject-matter of the trust is called the *trust-property* or *trust-money*. The *beneficial interest of the beneficiary* in his right against the trustee as owner of the trust property. The instrument, if any, by which the trust is declared is called the *instrument of trust*. A breach of any duty imposed on a trustee, as such by any law for the time being in force, is called a *breach of trust*.

Requisites of a trust. For the creation of a trust, the following requisites must be present :

(a) The intention to create a trust must be indicated with reasonable certainty by any words or act, otherwise there can be no trust. The language must also make it certain that the settlor intendend to create the trust.

(b) The subject-matter of the trust, that is the property which is to be bound by the trust, must be certain.

(c) The purpose for which the trust is created must be lawful and certain.

(d) The beneficiaries under the trust must be expressly designated or so defined that they are capable of being ascertained.

Registered. In this Act, unless there be something repugnant in the subject or context, 'registered' means registered under the law for the registration of documents for the time being in force.

Notice. A person is said to have 'notice' of a fact either *(a)* when he actually knows that fact, or *(b)* when, but for wilful abstention from inquiry or gross negligence, he would have known it, or *(c)* when information of the fact is given to or obtained by his agent, under the circumstances, mentioned in Sec. 229 of the Indian Contract Act, 1872.

Expressions defined in the Contract Act, 1872. All expressions used herein and defined in the Indian Contract, 1872, shall be deemed to have the meanings respectively attributed to them by that Act.

KINDS OF TRUSTS

Trusts have been classified in various ways. This classification may be according to :

1. The nature of the duties of the trustees

Simple trust. A simple trust is one wherein property is vested in one person upon trust for another. The nature of the trust, in this case, is not prescribed by the settlor but is left to the construction of law. Here the trustee is a mere passive depository of the trust property with no active duties to perform.

Special or specific trust. A special trust is one which is created for the execution of some specific purpose as expressed by the settlor. The trustee in this case is required to undertake the necessary measures for the execution of the settlor's intention.

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2. The objects of the trust

Private trust. It is a trust for the personal benefit of some ascertained individuals or a class of individuals or who within a definite time can be definitely ascertained.

Public or charitable trust. It is a trust for the benefit of an unascertained and fluctuating body of persons which may be either the public at large or a community or an appreciably large portion of the public answering a particular description, *e.g.*, a trust for the advancement of education in a certain area or in a certain sect.

In *Deoki Nandan* v. *Murlidhar*, A.I.R. (1957) S.C. 133, the Supreme Court pointed out the distinction between a private and a public trust as follows :

> "The distinction between a private trust and a public trust is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. While in the former the beneficiaries are persons who are ascertained or capable of being ascertained, in the latter they constitute a body which is incapable of ascertainment."

3. The mode of creation of trust

Express trust. It is trust created by the settlor using express words. It may be created by deed or will or even by word of mouth.

Implied trust. It is a trust which is implied from the circumstances of the case or from the unexpressed but presumable intention of the settlor.

Constructive trust. It is a trust which is not created by words spoken or written or implied from the circumstances of the case, but is raised by construction of equity in order to satisfy the demands of justice without reference to the presumed intention of the parties, for example, where a person makes a profit in a fiduciary position or out of trust property. This is done to prevent the inequitable acquisition by a person of property belonging to another person.

In the following cases there is a constructive trust :

(a) Seller's lien for unpaid price.

(b) Buyer's lien for price paid in advance

(c) Where a mortgagee sells under his power of sale, he is trustee of any surplus realised.

(d) Where a person makes profit out of trust property or is in a fiduciary position.

> *Example. P* instructs *A*, his agent, to sell certain goods at a price not below Rs. 1,000. *A* represents to *P* that he has sold the goods for Rs. 1,000, but in fact he keeps the goods with himself. *A* in this case is a constructive trustee for *P* of the goods or of any profit which he makes by the actual sale of the goods.

Resulting trust. It is species of an implied trust where the beneficial interest in property comes back, or results, to the person operating it, *i.e.*, the settlor or his legal representatives.

> *Examples. (a) A* bequeaths his house to a trustee for the benefit of his creditors. A large surplus remains after the creditors are paid off. The trustee must hold the surplus for the benefit or *A*.

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(b) *A* creates a trust of Rs. 10,000 for the maintenance of *B*. *B* dies before anything is spent on her. It becomes a resulting trust in favour of *A* or his legal representatives.

Precatory trust. It is a trust which is declared and created by precatory words, *i.e.*, words indicating a request, entreaty, wish, desire, hope, confidence, prayer or the like as to the disposal of the property. Thus where a testator left his property to his wife in the hope and confidence that she would use it to his liking and on her death leave it to his nieces, it was held that there was a precatory trust. The recent tendency is not to infer a trust from precatory words [*Adams & Kensington Vestry, Re* (1884) Ch. D. 394].

CREATION OF TRUSTS
(Chapter II, Secs. 4 to 10)

Lawful purpose (Sec. 4)

A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it—

(a) is forbidden by law or,

(b) is of such a nature that, if permitted, it would defeat the provisions of any law, or

(c) is fraudulent, or

(d) involves or implies injury to the person or property of another, or

(e) the Court regards it as immoral or opposed to public policy.

Every trust of which the purpose is unlawful is void. And where a trust is created for two purposes, of which one is lawful and the other unlawful, and the two purposes cannot be separated, the whole trust is void [*Chogal Bhandari* v. *Deputy Commercial Tax Officer*, A.I.R. (1976) S.C. 656].

Examples. (a) *A* conveys property to *B* in trust to apply the profits to the nurture of female foundlings to be trained up as prostitutes. The trust is void.

(b) *A* bequeaths property to *B* in trust to employ it in carrying on smuggling business, and out of the profits thereof to support *A*'s children. The trust is void.

A trust is not completely constituted, unless the settlor has divested himself of the beneficial interest in the property which is the subject of the trust. If it is to take effect during the life of the settlor, he can create it either by a transfer of the trust property to a trustee for the beneficiary, or declaring himself a trustee. If it is to operate after his death, he can create it by a will.

Trust of Immovable property (Sec. 5)

A trust in relation to immovable property is valid only if it is delcared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee. The same rule applies to a trust in relation to movable property. In addition to this, a trust relating to movable property may also be created orally. It may also be created by transfer of ownership of the property to the trustee.

Where the property is money and promissory notes and bonds, no registered instrument of transfer is necessary. The mere transfer of possession coupled with the intention of the parties that such delivery of possession

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should vest the property in the trustee is sufficient to create a trust [*Pachaiyappa Chetty* v. *Sivakami Ammal*, A.I.R. (1926) Mad. 109].

Where a non-testmentary instrument in writing is signed by the trustee as well as the author of the trust and registered, there is a valid trust both in regard to movable and immovable property [*Anant Ram* v. *Ishri Prasad*, A.I.R. (1925) Oudh 202].

The above rules do not apply where they would operate so as to effectuate a fraud.

Creation of trust (Sec. 6)

Subject to the provisions of Sec. 5, a trust is created when the author of the trust indicates with reasonable certaintly by any words or acts—

(a) an intention on his part to create thereby a trust,

(b) the purpose of the trust,

(c) the beneficiary, and

(d) the trust-property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) the author of the trust transfers the trust-property to the trustee.

Examples. (a) A bequeaths certain property to *B*. "having the fullest confidence that he will dispose it of for the benefict of *C*." This creates a trust so far as regards *A* and *C*.

(b) A bequeaths certain property to *B*. "hoping he will continue it in the family." This does not create a trust, as the beneficiary is not indicated with reasonable certainty.

(c) A bequeaths certain property to *B*, requesting him to distribute it amongst such members of *C*'s family as *B* should think most deserving. This does not crate a trust, for the beneficiaries are not indicated with reasonable certainty.

(d) A bequeaths certain property to *B*, desiring him to divide the bulk of it among *C*'s children. This does not create a trust, for the trust-property is not indicated with sufficient certainty.

Four certainties of trust as contemplated in Sec. 6. Sec. 6 declares that for a trust to be valiuly created, four things are necessary :

(1) *Certainty as to intention.* Equity looks at the intent rather than at the form. Therefore no special form of words is necessary for the creation of a valid trust. However if an intention to create a trust can unmistakably be construed from the expressions which the settlor has used, the Court will give effect to that intention. The intention to create a trust be indicated by words or acts with reasonable certainty. Where there is no indication with reasonable certainty by any words or acts of an intention to creatte a trust, there can be no trust [*Chambers* v. *Chambers*, A.L.R. (1944) P.C. 78].

(2) *Certainty as to purpose.* Indefiniteness or uncertainty in relation to the purpose or objects of a trust may render the entire trust void. The objects of the trust or the persons to be benefited by a trust must be expressly designated or so defined that they are capable of being ascertained [*Wright* v. *Atkins*, (1823) Turn. & R. 143]. If this is not possible, the trust is void for uncertainty [*Morrice* v. *Bisop of Durham*, (1805) 10 Ves. 522].

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(3) *Certainty as to trust property.* There must be reasonable certainty about the subject-matter, *i.e.*, trust-property, of the trust. According to Sec. 8, the subject-matter of a trust must be property tranferable to the beneficiary. It must not be a merely beneficial interest under a subsisting trust.

(4) *Certainty as to beneficiaries.* For constitution of a trust, beneficiaries must be indicated with reasonable certainty, otherwise the trust would be void for uncertainty [*Official Receiver* v. *Kulandaivelam*, A.L.R. (1946) Mad. 519].

Who may create trust ? (Sec. 7)

A trust may be created—

(a) by every person competent to contract, and

(b) with the permission of a principal Civil Court of original jurisdiction, by or on behalf of a minor.

The creation of the trust is, however, subject in each case to the law for the time being in force as to the circumstances and the extent in and to which the author of the trust may dispose of the trust-property.

Subject of trust (Sec. 8)

The subject-matter of a trust must be property transferable to the beneficiary. It must not be merely beneficial interest under a subsisting trust.

Who may be beneficiary ? (Sec. 9)

Every person capable of holding property may be a beneficiary. A proposed beneficiary may renounce his interest under the trust by—

(a) disclaimer addressed to the trustee, or

(b) by setting up, with notice of the trust, a claim inconsistent therewith.

Who may be trustee ? (Sec. 10)

Every person capable of holding property may be a trustee. Where, however, the trust involves the exercise of discretion, he cannot execute it unless he is competent to contract. But no one is bound to accept a trust. A trust is accepted by any words or acts of the trustee indicating with reasonable certainty such acceptance. Instead of accepting a trust, the intended trustee may within a reasonable period, disclaim it, and such disclaimer shall prevent the trust-property from vesting in him.

A disclaimer by one of two or more co-trustees vests the trust property in the others, and makes him or them sole trustee or trustees from the date of the creation of the trust.

Examples. (a) *A* bequeaths certain property to *B* and *C*, his executors, as trustees for *D*. *B* and *C* prove *A*'s will. This is in itself an acceptance of the trust, and *B* and *C* hold the property in trust for *D*.

(b) *A* transfers certain property to *B* in trust to sell it and pay out of the proceeds *A*'s debts. *B* accepts the trust and sells the property. So far as regards *B* trust of the proceeds is created for *A*'s creditors.

(c) *A* bequeaths a lakh of rupees to *B* upon certain trust and appoints him his executor. *B* severs the lakh from the general assets and appropriates it to the specific purpose. This is an acceptance of the trust.

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DUTIES AND LIABILITIES OF TRUSTEES
(Chapter III, Secs. 11 to 30)

Duties of trustees (Secs. 11 to 22)

1. *To execute trust* (Sec. 11). A trustee is bound *(a)* to fulfill the purpose of the trust, and *(b)* to obey the directions of the author of the trust given at the time of its creation. But the trustee is not bound to obey the directors which are illegal, impracticable, or manifestly injurious to the beneficiaries. The directions given by the settlor may be modified by the consent of all the beneficiaries being competent to contract. Where the beneficiary is incompetent to contract, his consent may be given by a principal Civil Court of original jurisdiction.

Unless a contrary intention be expressed, the purpose of a trust for the payment of debts shall be deemed to be—

(a) to pay the debts of the author of the trust existing and recoverable at the date of the instrument of trust, or when such instrument is a will, at the date of his death, and

(b) in the case of debts not bearing interest, to make such payment without interest.

Examples. (a) A, as trustee, is simply authorised to sell certain land by public auction. He cannot sell the land by private contract.

(b) A, a trustee of certain land for *X, Y* and *Z*, is authorised to sell the land to *B* for a specified sum. *X, Y* and *Z*, being competent to contract, consent that *A* may sell the land to *C* for a lesser sum. *A* may sell the land accordingly.

(c) A, a trustee for *B* and her children, is directed by the author of the trust to lend, on *B's* request, trust-property to *B's* husband, *C*, on the security of his bond. *C* becomes insolvent, and *B* requests *A* to make the loan. *A* may refuse to make it.

2. *To inform himself of state of trust-property* (Sec. 12). A trustee is bound *(a)* to acquaint himself, as soon as possible, with the nature and circumstances of the trust-property, *(b)* to obtain, where necessary, a transfer of the trust-property to himself, and *(c)* to realise trust-moneys invested on insufficient or hazardous security.

Examples. (a) The trust-property is a debt outstanding on personal security. The instrument of trust gives the trustee no discertionary power to leave the debt so outstanding. The trustee's duty is to recover the debt without unnecessary delay.

(b) The trust-property is money in the hands of one of two co-trustees. No discretionary power is given by the instrument of trust. The other co-trustee must not allow the former to retain the money for a longer period than the circumstances of the case required.

3. *To protect title to trust-property* (Sec. 13). A trustee is bound *(a)* to maintain and defend all such suits, and *(b)* to take steps, as may be reasonably requisite, for the preservation of the trust-property and the assertion on protection of the title thereto.

4. *Not to set up title adverse to beneficiary* (Sec. 14). A trustee must not for himself or another set up or aid any title to the trust-property adverse to the interest of the beneficiary.

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5. *To take care* (Sec. 15). A trustee is bound to deal with the trust-property as carefully as a man of ordinary prudence would deal with such property if it were his own. In the absence of a contract to the contrary, a trustee so dealing is not responsible for the loss, destruction, or deterioration of the trust-property.

Examples. (a) *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust-funds to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. *A* is not bound to make good the loss.

(b) *A*, a trustee of two debts for *B*, releases one and compounds the other, in good faith, and reasonably believing that it is for *B*'s interest to do so. *A* is not bound to make good any loss caused thereby to *B*.

(c) *A*, a trustee directed to sell the trust-property by auction, sells the same, but does not advertise the sale and otherwise fails in reasonable diligence in inviting competition. *A* is bound to make good the loss caused thereby to the beneficiary.

(d) *A*, a trustee for *B*, in execution of his trust, sells the trust-property, but from want of due diligence on his part fails to receive part of the purchase-money. *A* is bound to make good the loss thereby caused to *B*.

(e) *A*, a trustee for *B* of a policy of insurance, has funds in hand for payment of the premiums. *A* neglects to pay the premiums, and the policy is consequently forfeited. *A* is bound to make good the loss to *B*.

6. *To convert perishable property* (Sec. 16). Where the trust is created for the benefit of several persons in succession, and the trust-property is of a wasting nature (as leaseholds or long annuities) or a future or reversionary interest, the trustee is bound to convert the property into property of permanent and immediately profitable character. The trustee is not so bound if a contrary intention may be inferred from the instrument of trust.

If a property has been specifically given or where the trust instrument indicates an intention that the trust-property is to be enjoyed in *specie*, the trustee should not sell it [*Re Beaufoy*, (1850) 1 Sm. & Giff. 20].

Examples. (a) *A* bequeaths to *B* all his property in trust for *C* during his life, and on his death, for *D*, and on *D*'s death for *E*. *A*'s property consists of three leasehold houses, and there is nothing in *A*'s will to show that he intended the houses to be enjoyed in *specie*. *B* should sell the houses, and invest the proceeds in accordance with Sec. 20 (which deals with investment of trust-money).

(b) *A* bequeaths to *B* his three leasehold houses in Calcutta and all the furniture therein in trust for *C* during his life, and on his death for *D*, and on *D*'s death for *E*. Here an intention that the house and furniture should be enjoyed in *specie* appears clearly, and *B* should not sell them.

7. *To be impartial* (Sec. 17). Where there are more beneficiaries than one, the trustee is bound to be impartial, and must not execute the trust for the advantage of one at the expense of another.

Were the trustee has a discretionary power, Sec. 17 shall not be deemed to authorise the Court to control the power exercised reasonably and in good faith of such discretion.

Example. *A*, a trustee for *B*, *C* and *D*, is empowered to choose between several specified modes of investing the trust-property. *A* honestly chooses one of these

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modes. The Court will not interfere, although the result of the choice may be to vary the relative rights of *B*, *C*, and *D*.

8. *To prevent waste* (Sec. 18). Where the trust is created for the benefit of several persons in succession and one of them who is in possession of the trust-property, if he commits or threatens to commit, any act which is destructive or permanently injurious thereto, the trustee is bound to take measures to prevent such act.

9. *To keep accounts and furnish information* (Sec. 19). A trustee is bound—

(a) to keep clear and accurate accounts of the trust-property, and

(b) at all reasonable times, at the request of beneficiary, to furnish him with full and accurate information as to the amount and state of the trust-property.

10. *To invest trust-money* (Secs. 20 and 20-A). Where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound to invest the money on the approved securities and on no others (Sec. 20).

A trustee may invest in any of the approved securities, notwithstanding that the same may be redeemable and that the price exceeds the redemption value. He may retain until redemption any redeemble stock, fund or security which may have been purchased (Sec. 20-A).

11. *To sell within specified time* (Sec. 22). Sometimes a trust deed may direct the trustee to sell the trust-property within a specified time. In that case, he must sell the property accordingly. The time may be extended by the Court. If he himself extends the time and the beneficiary is injured by the extension, the latter can sue him for compensation ; and the burden of proving that the beneficiary has not been injured lies on the trustee.

Example. A bequeaths property *to B*, directing him with all convenient speed and within 5 years to sell it, and apply the proceeds for the benefit of *C*. In the exercise of reasonable discretion, *B* postpones the sale for 6 years. The sale is not thereby tendered invalid, but *C*, alleging that he has been injured by the postponement, institutes a suit against *B* to obtain compensation. In such suit the burden of proving that *C* has not been injured lies on *B*.

Where a trustee holds trust-property on trust for sale or exercises a power of sale contained in the instrument of trust, he must endeavour to sell the property to the best advantage of the beneficiaries [*Downes* v. *Grazebrook*, (1817) 3 Mer. 208] and must not offer it for sale in a way calculated to depreciate its value or prejudice the sale [*Ord* v. *Noel*, (1820) 5 Mad. 438]. *The trustee, in executing a trust for sale, is not bound by the wishes of the beneficiary* [*Selby* v. *Bowie*, (1986) 9 Jur. (N.S.) 432] and he may be held liable if, in adherence to those wishes, he neglects to sell the trust-property advantageously [*Taylor* v. *Tabrum*, (1833) 6 Sim. 281].

Liabilities of trustees (Secs. 23 to 30)

Breach of trust—its meaning and consequences. A breach of any duty imposed on a trustee as such by any law for the time being in force is called a breach of trust. It also consists of any act, omission or default on the part of a trustee which is not authorised or excused by the terms of the trust-instrument or by law.

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Breach of trust may be either *active* or *passive*. A trustee commits an active breach of trust when, for example, he buys the trust-property on his own account, or when he lends trust-money on second mortgage or when he mixes trust-money with his own money. A passive breach of trust consists in omitting to do something which the trustee is required to do under the trust-deed as, for example, neglect to get the title deed in time, or non-payment of the insurance premium, etc.

Liability for breach of trust (Sec. 23). Where a trustee commits a breach of trust, he is liable to make good the loss which the trust-property or the beneficiary has thereby sustained. It makes no difference even if there is no consideration involved or the trustee himself is the author of the trust (*Drosier* v. *Brereton*, 15 Beav. 221). He is, however, not liable—

(1) where the beneficiary has by fraud induced the trustee to commit the breach, or

(2) where the beneficiary, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, *(i)* concurred in the breach, or *(ii)* subsequently acquiesced therein with full knowledge of the facts of the case and of his right as against the trustee.

A trustee committing a breach of trust is not liable to pay interest except in the following cases :

(a) where he has actually received interest ;

(b) where the breach consists in unreasonable delay in paying trust-money to the beneficiary ;

(c) where the trustee ought to have received interest, but has not done so ;

(d) where he may be fairly presumed to have received interest.

He is liable in case *(a)* to account for the interest actually received, and in cases *(b)*, *(c)* and *(d)* to account for simple interest at the rate of 6 per cent per annum, unless the Court otherwise directs.

(e) where the breach consists in failure to invest trust-money and to accumulate the interest or dividends thereon, he is liable to account for compound interest (with half-yearly rests) at the same rate ; and

(f) where the breach consists in the employment of trust-property or the proceeds thereof in trade or business, he is liable to account, at the option of the beneficiary, either for compound interest (with half-yearly rests) at the same rate, or for the net profits made by such employment.

A breach of trust by a trustee is also an offence under the Indian Penal Code, 1860.

Examples. (a) A trustee improperly leaves trust-property outstanding, and it is consequently lost. He is liable to make good the property lost, but he is not liable to pay interest thereon.

(b) A bequeaths a house to *B* in trust to sell it and pay the proceeds to *C*. *B* neglects to sell the house for a great length of time whereby the house deteriorates and its market price falls. *B* is answerable to *C* for the loss.

(c) A trustee is guilty of unreasonable delay in investing trust-money in accordance with Sec. 20, or in paying it to the beneficiary. The trustee is liable to pay interest thereon for the period of delay.

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(d) An instrument of trust directs the trustee to invest trust-money either in specified securities or on mortgage of immovable property. The trustee does neither. He is liable for the principal money and interest.

Extent of trustee's liability

1. *No set-off allowed to trustee* (Sec. 24). A trustee who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property cannot set off against his liability a gain which has accured to another portion of the trust-property through another and distinct breach of trust. But where loss and gain arise out of the same transaction, the trustee may be allowed set-off.

2. *Non-liability for predecessor's default* (Sec. 25). Where a trustee succeds another, he is not, as such, liable for the acts or defaults of his prodecessor. He must, however, ascertain that the trust fund is properly invested. He must set right any breach of trust committed by his predecessor in that respect. If he fails to do so, he may be liable for any loss suffered by the trust-property.

3. *Non-liability for co-trustees' default* (Sec. 26). A trustee is not ordinarly liable for a breach of trust committed by his co-trustee. But where he is negligent and fails to take the necessary steps for the protection of the trust-property, he may be held liable for a breach of trust by his co-trustee. He also becomes liable for a breach of trust committed by his co-trustee—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application ;

(b) where he allows his co-trustee to receive trust-property and fails to make due inquiry as to the co-trustee's dealings therewith or allows him to retain it longer than the circumstances of the case reasonably require ;

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it or does not within a reasonable time take proper steps to protect the beneficiary's interest.

Even in the above three cases, if the trust-deed expressly declares that the trustee will not be liable, he cannot be made liable for a breach of trust by his co-trustee.

A co-trustee who joins in signing a receipt for trust-property and proves that he has not received and same is not answerable, by reason of such signature only, for loss or mis-application of the property by his co-trustee.

Example. A bequeaths certain property to *B* and *C*, and directs them to sell it and invest the proceeds for the benefit of *D*. *B* and *C* accordingly sell the property, and the purchase-money is received by *B* and retained in his hands. *C* pays no attention to the matter for 2 years and then calls on *B* to make the investment. *B* is unable to do so, becomes insolvent, and the purchase-money is lost. *C* may be compelled to make good the amount.

4. *Several liability of co-trustees.* (Sec. 27). Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Contribution as between co-trustees. Each trustee is liable to the beneficiary for the whole loss occasioned by breach of trust. He is, however, entitled to contribution from other co-trustees if he refunds the entire loss. If all the trustees are equally guilty, the trustee who has had to refund the loss may compel the other trustees to contribute. But as between the trustees, if one

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is less guilty than another and has had to refund the loss, he may compel the latter to make good such loss.

If one of serveral trustees is alone actively concerned in a breach of trust, he may be deprived of the right to contribution from his co-trustees and may be ordered to pay the entire loss (*Price* v. *Price*, 42 L.T. 626). Again, where one of the trustees is also a beneficiary, he must bear the loss to the full extent of his share in the trust estate, and ask for contribution, only if the loss exceeds his share [*Chillingworth* v. *Chambers*, (1896) 1 Ch. 885]. Similarly, where a beneficiary instigates a trustee to commit a breach of trust, the Court may impound the interest of that beneficiary in the trust-estate to indemnify the trustee [*Griffith* v. *Hughes*, 3 Ch. 106]. Where one of the trustees obtained a personal benefit from the breach in which others took no active part, he must bear the loss to the extent of the benefit obtained by him.

A trustee who has been guilty of fraud is not entitled to institute a suit to compel contribution from other co-trustees after refunding the loss.

5. *Delivery of trust-property without notice of transfer by beneficiary* (Sec. 28). When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the beneficiary originally entitled thereto, he is not liable for the property so paid or delivered.

6. *Where beneficiary's interest forfeited to Government* (Sec. 29). When the beneficiary's interest is forfeited or awarded by legal adjudication to the Government, the trustee is bound to hold the trust-property to the extent of such interest for the benefit of beneficiary in such manner as the State Government may direct in this behalf.

7. *Indemnity of trustees* (Sec. 30). Where there are several trustees, each shall be respectively chargeable only for such moneys, stocks, funds and securities as he respectively actually receives. He shall not be answerable for the acts or defauls of his co-trustees nor shall he be answerable for the conduct of any banker, broker or other person in whose hands any trust-property may be placed. He shall also be not answerable for the insufficiency or deficiency of any stocks, funds or securities, nor otherwise for involuntary losses.

RIGHTS AND POWERS OR TRUSTEES
(Chapter IV. Secs. 21 to 45)

Rights of trustees (Secs. 31 to 36)

1. *Right to title deeds* (Sec. 31). A trustee is entitled to have in his possession the instrument of trust and all the documents of title relating solely to the trust-property. This right is necessary because it is the duty of the trustee to institute and defend all actions for protection of the trust-property.

It will be breach of the trustee's duties if he willingly lets the title deeds relating to the trust-property to get out of his possession (*Meux* v. *Beel*, 1 Hare 99). He will be responsible for the loss if he improperly allows even the settlor to get possession of the title-deeds. He may however be, under certain circumstances (*e.g.*, when the trust-property is in the course of development as a building estate), justified in leaving the deeds in the custody of his solicitors [*Field* v. *Field*, (1874) 1 Ch. 425]. Thus title deeds stand on a different footing from securities which cannot be left with a solicitor (*Lewis* v. *Noobs*, 8. Ch. D. 591). The beneficiary however has the right to inspect the title deeds

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Co-trustees are justified in leaving the deeds to one of themselves. The trustee may even sue to have the title-deeds delivered up (*Smith* v. *Willis*, Tay 159).

2. *Right to reimbursement of expenses* (Sec. 32). Every trustee may reimburse himself, or pay out of the trust-property, all expenses properly incurred. These expenses may be incurred in—

(a) the execution of the trust, or

(b) the realisation, preservation or benefit of the trust-property, or

(c) the protection or support of the beneficiary.

If the trustee pays such expenses out of his own pocket, he has a first charge upon the trust-property for such expenses and interest thereon ; and he cannot be compelled to part with his control of that property until such expenses are paid. If he fails to recover the expenses from the trust-property, he is entitled to recover them from the beneficiary personally. Where a trustee has by mistake made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If the beneficiary's interest fails, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

3. *Right to indemnity from gainer by breach of trust* (Sec. 33). A trustee has a right to be indemnified by a stranger who has gained an advantage from a breach of trust to the extent of the amount actually received by such stranger under the breach ; and where such person is a beneficiary, the trustee has a charge on his interest for such amount. A trustee committing breach of trust fraudulently is not entitled to be indemnified by a third party deriving advantage from the breach.

4. *Right to apply to Court for opinion.* (Sec. 34). A trustee may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for its opinion, advice or direction on questions respecting the management or administration of the trust-property. He cannot however refer questions of details, difficulty or importance, not proper in the opinion of the Court for summary disposal. A copy of such petition shall be served upon the person interested in the application as the Court thinks fit. The trustee stating in good faith the facts in such petition and acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee.

The costs of every application under Sec. 34 shall be in the discretion of the Court to which the application is made.

5. *Right to settlement of accounts* (Sec. 35). When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled. Where nothing is due to the beneficiary under the trust, he is entitled to an acknowledgement in writing that nothing is due.

General authority of trustee (Sec. 36). A trustee has the general authority to do all acts which are reasonable and proper for the realisation, protection or benefit of the trust-property, and for the protection or support of a beneficiary who is not competent to contract. This general authority is in addition to the powers expressly conferred by this Act and the instrument of trust, and is subject to the restrictions, if any, contained in such instrument, and to the provisions of Sec. 17. Further, except with the permission of principal Civil Court of original jurisdiction, a trustee must not lease trust-

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property, for a term exceeding the lease. This rule does not apply to a lease in excess of 21 years granted with the permission of the Court. And even where such a lease is granted without the permission of the Court, the lease is not void, but voidable at the option of the beneficiary.

Powers of trustees (Secs. 37 to 45)

1. *Power to sell, buy and convey* (Secs. 37 to 39). (1) *Power to sell in lots* (Sec. 37). Where the trustee is empowered to sell any trust-property, he may sell the same subject to the directions contained in the trust instrument. In the absence of any such direction, he may sell the trust-property, either together or in lots, by public auction or private contract and either at one time or at several times.

(2) *Power to sell under special conditions* (Sec. 38). The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of the title or otherwise, in any conditions of sale or contract for sale, as he thinks fit. He may also buy-in the property or any part thereof at any auction. Further he may rescind or vary any contract for sale and re-sell the property so bought-in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby. In re-selling, he should not cause any unnecessary or avoidable delay, for any loss due to such delay will have to be borne by him [*Taylor* v. *Tabrum*, (1833) 6 Sim. 281].

Where a trustee is directed to sell trust-property or to invest money in the purchase of property, he may exercise a reasonable discretion as to the time of effectng the sale or purchase.

Examples. (a) A bequeaths property to *B*, directing him to sell it with all convenient speed and pay the proceeds to *C*. This does not render an immediate sale imperative.

(b) A bequeaths property to *B*, directing him to sell it at such time and in such manner as he shall think fit and invest the proceeds for the benefit of *C*. This does not authorise *B*, as between him and *C*, to postpone the sale to an indefinite period.

(3) *Power to convey* (Sec. 39). For the purpose of completing any such sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

2. *Power to vary investments* (Sec. 40). A trustee may, at his discretion, call in any trust-property invested in any security, and invest the same on any of the approved securities and from time to time, vary any such investments for others of the same nature. But where the beneficiary is competent to contract and entitled at the time to receive the income of the trust-property for his life, no such change of investment shall be made without his consent in writing.

3. *Power to apply property of minors for their maintenance* (Sec. 41). When any property is held by a trustee in trust for a minor, the income of the property may be spent by the trustee for the maintenance or education of the minor. The income may also be spent for the reasonable expenses of his religious worship, marriage or funeral. The trustee may also give a part of the income to the guardian (if any). The residue (if any) of the income should be invested in approved securities. Where the income is insufficient for the above purposes, the trustee may with the permission of the Court apply the whole

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or any part of the trust-property for the maintenance, education, etc., of the minor.

Sec. 41 shall not affect the provisions of any local law for the time being in force relating to the persons and property of minors.

4. *Power to give receipts* (Sec. 42). A trustee may give a receipt in writing for any money, securities or other movable property payable, transferable or deliverable to him by reason of any trust or power. In the absence of fraud, such receipt shall discharge the person paying, transferring, or delivering the same from any responsibility. The receipt shall also discharge such person from seeing to the application of the money, securities or other movable property or being accountable for any loss or misapplication thereof. This in other words means that it is not the duty of the persons paying, transferring or delivering money, securities or other movable property to see that the money etc. is properly applied or used. That is the function of the trustee.

5. *Power to compound, etc.* (Sec. 43). Two or more trustees acting together, may if and they think fit,—

(a) accept any composition for any debt or for any property claimed ;

(b) allow any time for payment of any debt ;

(c) compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the trust ; and

(d) for any of those purposes, enter into, give, execute and do such agreements, instruments of composition or arrangement, releases and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by Sec. 43 on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorised to execute the trust and powers thereof.

Sec. 43 applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

6. *Power to several trustees of whom one disclaims or dies* (Sec. 44). When an authority to deal with the trust-property is given to several trustees and one of them disclaims or dies, the authority may be exercised by the continuing trustees. However if from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number of the remaining trustees, the continuing trustees (when their number is less than the required number) cannot exercise the authority. The disclaimer should be made within a reasonable time.

7. *Suspension of trustee's powers by decree* (Sec. 45). Where a decree has been made in a suit for the execution of a trust, the power of the trustee to act on his own responsibility is suspended ; and he will have to act in conformity with such decree or with the sanction of the Court by which the decree has been made. Where an appeal against the decree is pending, he will have to act with the sanction of the Appellate Court.

DISABILITIES OF TRUSTEES
(Chapter V, Secs, 46 to 54)

1. *Trustee cannot renounce* (Sec. 46). A trustee, who has accepted the trust cannot afterwards renounce it, except—

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(a) with the permission of the Court, or

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(b) if the beneficiary is competent to contract, with his consent, or

(c) by virtue of a special power in the instrument of trust.

2. *Trustee cannot delegate* (Sec. 47). As a general rule, a trustee cannot delegate hhis office or any of his duties either to a co-trustee or to a stranger. He can however delegate if—

(a) the instrument of trust so provides, or

(b) the delegation is in the regular course of business, or

(c) the delegation is necessary, or

(d) the beneficiary, being competent to contract, consents to the delegation.

However, the appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion, is not a delegation.

Where an agent is authorised by trustees to receive trust-money and receives it accordingly, the receipt of that money by the agent binds the trustees and discharges the person who paid it (*Roberston* v. *Armstrong*, 28 Beav. 123).

Examples. (a) *A* bequeaths certain property to *B* and *C* on certain trusts to be executed by them or the survivor of them or the assings of such survivor. *B* dies. *C* may bequeath the trust-property to *D* and *E* upon the trusts of *A*'s will.

(b) *A* is trustee of certain property with power to sell the same. *A* may employ an auctioneer to effect the sale.

(c) *A* bequeaths to *B* 50 houses let at monthly rents in trust to collect the rents and pay them to *C*. *B* may employ a proper person to collect these rents.

If a trustee delegates his office or any of any of his duties (except in the cases mentioned above), he will be liable for any breach of trust commited by the person to whom the office has been entrusted, for trustees cannot divest themselves of their trust at their pleasure (*Bradwell* v. *Catchpole*, 3 Swanst 79). Trustees who take on themselves the management of the property for the benefit of others have no right to shift their duties on other persons ; and if they employ an agent, they continue to be responsible towards their *cestui que trust* for whom they have undertaken the duty (*Turner* v. *Corney*, 5 Beav. 517).

It is thus clear that no trustee can delegate his powers and duties to another trustee. An agreement to do so is illegal and void [*Mahadeo* v. *Balkrishna*, A.I.R. (1952) Cal. 763]. Such an agreement is void *ab initio* [*Marimuthu Pillai* v. *Narayanavadian Bhagavathy*, (1949) T.C.L.R. 70].

Sec. 47 provides that a trustee can delegate his office or any of his duties either to a co-trustee or to a stranger when the delegation is in the regular course of business, or the delegation is necessary as, for example, when expert knowledge is required [*Parasurama Udayar* v. *Vedaji Basker Thirumal Rao Sahib*, A.I.R., (1921) Mad. 623]. So trustees have always been able to appoint stewards, bailiffs, workmen and other agents of the like kind, for there is a moral necessity for them to do so [*Learoyd* v. *Whiteley*, (1887) 12 A.C. 727]. And on the same ground they have been held to be justified in employing solicitors, valures, auctioneers, stock-brokers, accountants and other skilled persons to do acts which they themselves are not competent to do.

3. *Co-trustees cannot act singly* (Sec. 48). When there are more trustees than one, all must join in the execution of the trust, except where the instrument of trust otherwise provides.

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4. *Control of discretionary power* (Sec. 49). Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

5. *Remuneration of trustee* (Sec. 50). As a general rule, a trustee has no right to remuneration for his trouble, skill and loss of time in executing the trust (*Robinson* v. *Pett*, 3 P Wms. 132). In *Broughton* v. *Broughton*, 5 De. G.M. & G. 160, Lord Cranworth said, "The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with his duties." The general rule does not apply—

(a) when the instrument of trust expressly provides for remuneration to the trustee,

(b) when the trustee enters into a contract with the beneficiary, or

(c) when the Court at the time of accepting the trust gives express directions for the remuneration of trustee.

Sec. 50 does not apply to any Official Trustee, Administrator General, Public Curator (guardian appointed to a person past the age of puberty to manage his affairs, when from any cause he is unifit to manage them himself), or a person holding certificate of administration.

6. *Use or sale of trust-property by trustee* (Secs. 51 to 53). (1) *Trustee may not use trust-property for his own profit* (Sec. 51). A trustee may not use or deal with the trust-property for his own profit or for any other purpose unconnected with the trust. If he does so, he will the constructive trustee of the profits ; and if there be no profits, he will be liable for the breach of trust and will have to pay interest.

(2) *Trustee for sale or his agent may not buy* (Sec. 52). No trustee whose duty it is to sell trust-property can buy the same or any interest therein, on his own account. Even an agent employed by such trustee for the purpose of the sale cannot buy the trust-property on his own account. This is in conformity with the general principle that when any one is in a fiduciary position, he cannot sell to himself [*Kanhyalal* v. *National Bank*, A.I.R. (1923) P.C. 114].

(3) *Trustee may not buy beneficiary's interest without permission* (Sec. 53). No trustee can buy the trust-property or any part thereof, nor can he be the mortgagee or lessee with the permission of the Court. Such permission is granted only when the Court is satisfied that the proposed purchase, mortgage, or lease is manifestly for the advantage of the beneficiary. This rule applies not only to a trustee who is in office, but also to a person who has ceased to be a trustee.

Trustee for a purchase. No trustee whose duty it is to buy or to obtain a mortgage or lease of a particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

7. *Co-trustees cannot lend to one of them* (Sec. 54). A trustee or co-trustee, whose duty it is to invest trust-money on mortgage or personal security, must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

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RIGHTS AND LIABILITIES OF THE BENEFICIARY
(Chapter VI, Secs. 55 to 69)

1. *Right to rents and profits* (Sec. 55). The beneficiary has, subject to the provisions of the instrument of trust, a right to the rents and profits of the trust-property. He has only a right to proceed against the trustee (*Lewis Kunha* v. *Coelho*, 18 M.L.T. 158).

2. *Right to specific execution* (Sec. 56). The beneficiary is entitled to have the intention of the author of the trust specifically executed to the extent of the beneficiary's interest.

Right to transfer of possession. Where there is only one beneficiary and he is competent to contract, he may require the trustee to transfer the trust-property to him or to such person as he may direct. Where there are several beneficiaries and they are competent to contract and all are of one mind, they may require the trustee to transfer the trust-property to them, or to such person as they may direct.

Property transferred or bequeathed for the benefit of a married women. Sometimes property may be transferred or bequeathed for the benefit of a married women, so that she shall not have power to deprive hereself of her beneficial interest in that property. In such a case, the provision in the immediately preceding Para above does not apply to such property during her marriage.

It is a general rule that every person who accepts a trust is bound to execute it with fidelity and with reasonable diligence. The intention of the creator of the trust has to be considered and carried out (*Craven* v. *Cradock*, 20 L.T.N.S. 638), for it is the duty of the trustee to adhere to the terms of the trust, in all things, great and small, important and seemingly unimportant.

Examples. (a) Certain Government securities are given to trustees upon trust to accumulate the interest unit *A* attains the age of 21, and to transfer the gross amount to him. *A* on attaining majority may as the person exclusively interested in the trust-property require the trustees to transfer it immediately to him.

(b) *A* bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for *B* who has attained his majority and is otherwise competent to contract. *B* may claim the Rs. 10,000.

(c) *A* transfers certain property to *B* and directs him to sell or invest it for the benefit of *C*, who is comptent to contract. *C* may elect to take property in its original character.

3. *Right to inspect and take copies of instrument of trust, accounts, etc.* (Sec. 57). The beneficiary has a right to inspect and take copies of—

(a) the instrument of trust ;

(b) the documents of title relating solely to the trust-property ;

(c) the accounts of the trust-property and the vouchers (if any) by which they are supported ; and

(d) the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

The right is available to the beneficiary as against the trustee and all persons claiming under him with notice of the trust.

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Who may ask for accounts ? All persons interested in the trust-property have a right to demand accounts and particulars as to trust-property and as to the mode of dealing with it [*Low* v. *Bouverie*, (1891) 3 Ch. 82].

4. *Right to transfer beneficial interest* (Sec. 58). The beneficiary may, if he is competent to contract, transfer his interest. This right of the beneficiary is however subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest. But when property is transferred or bequeathed for the benefit of a married women, so that she shall not have power to deprive herself of her beneficial interest, she cannot transfer such interest during her marriage.

5. *Right to sue for execution of trust* (Sec. 59). The beneficiary may institute a suit for the execution of the trust—

(a) where no trustees are appointed, or

(b) where all the trustees die, disclaim or are discharged, or

(c) where for any other reason the execution of a trust by the trustee is or becomes impracticable.

Where the beneficiary institutes a suit for the execution of the trust, the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

Sec. 59 is an illustration of the maxim, "A trust shall not fail for want of a trustee." Thus where no trustees are appointed or all the trustees die, disclaim, or become incapable of taking the estate , the trust is not thereby defeated. In such a case, the Court will substitute itself in the place of the trustees and will exercise by the power the most reasonable rule.

6. *Right to proper trustees* (Sec. 60). The beneficiary has a right (subject to the provisions of the instrument of trust) that the trust-property shall be propertly protected and held and administered proper by persons and by a proper number of such persons.

The following are not proper persons within the meaning of Sec. 60 :

(a) a person domiciled abroad ;

(b) an alien enemy ;

(c) a person having an interest inconsistent with that of the beneficiary ;

(d) unless the personal law of the beneficiary allows otherwise, a married women and a minor.

Further, when the administration of the trust involves the receipt and custody of money, there should be at least two trustees.

Examples. (a) A, one of several beneficiaries, proves that *B*, the trustee, has improperly disposed of part of the trust-property, or that the property is in danger from *B's* being in insolvent circumstances, or that he is incapable from acting as trustee. *A* may obtain appointment of a trustee of the trust-property.

(b) A bequeaths ceretain jewels to *B* in trust for *C*. *B* dies during *A's* lifetime ; then *A* dies. *C* is entitled to have the property conveyed to a trustee for him.

(c) A conveys certain property to four trustees in trust for *B*. Three of the trustees die. *B* may institute a suit to have three new trustees appointed in place of the deceased trustees.

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(d) *A* conveys certain property to three trustees in trust for *B*. All the trustees disclaim. *B* may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

(e) *A*, a trustee for *B*, refuses to act, or goes to reside permanently out of India or is declared an insolvent, or compounds with the creditors or permits a co-trustee to commit a breach of trust. *B* may institute a suit to have *A* removed and a new trustee appointed in his place.

7. *Right to compel to any act of duty* (Sec. 61). The beneficiary has a right that his trustee shall be—

(a) compelled to perform any particular act of his duty as such, and

(b) restrained from commiting any contemplated or probable breach of trust.

If the trustee fails in his duty, the beneficiary may institute a suit to compel him to do any particular act or to restrain him from committing any contemplated or probable breach of trust.

Examples. (a) *A* contracts with *B* to pay him monthly Rs. 100 for the benefit of *C*. *B* writes and signs a letter declaring that he will hold in trust for *C* the money so to be paid. *A* fails to pay the money in accordance with his contract. *C* may compel *B* on a proper indemnity to allow *C* to sue on the contract in *B*'s name.

(b) *A* is trustee of certain land, with a power to sell the same and pay the proceeds to *B* and *C* equally. *A* is about to make an improvident sale of the land. *B* may sue on behalf of himself and *C* for an injunction to restrain *A* from making the sale.

8. *Wrongful purchase by trustee* (Sec. 62). Where the trustee has wrongfully purchased trust-property, the beneficiary has a right to have the property declared subject to the trust. Alternatively, the beneficiary has the right to have the property retransferred—

(a) by the trustee if the property remains in his hands unsold ; or

(b) by a third person if he, with the notice of the trust, had purchased the property from the trustee.

But in the above cases, the beneficiary must repay the purchase money paid by the trustee, with interest, and such other expense (if any) as the trustee has properly incurred so to preserve the property. In return the trustee or purchaser in his turn must—

(a) account for net profits of his property ;

(b) be charged with an occupation rent, if he has been in actual possession of the property, and

(c) allow the beneficiary to deduct a proportionate part of the purchase money if the property has been deteriorated by the acts or omissions of the trustee or purchaser.

The above provisions do not—

(a) impair the rights of lessees and others who, before the institution of a suit to have the property subject to the trust or retransferred, have contracted in good faith with the trustee or purchaser, or

(b) entitle the beneficiary to have the property declared or retransferred where he (being competent to contract) has himself (without being under coercion or undue influence) ratified the sale to the trustee with full knowledge of the facts of the case and of his rights as against the trustee.

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9. *Right to follow trust-property into the hands of third persons* (Sec. 63). Where the trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. Sometimes the trustee may have disposed of the trust-property. In such a case if the money or other property which the trustee has received therefor can be traced in his hands or in the hands of his legal representative or legatee (the person to whom the gift of personal property by will is given), the beneficiary has rights as nearly as may be the same as his rights in the respect of the original trust-property.

Examples. (a) A, a trustee for *B* of Rs. 10,000, wrongfully invests the money in the purchase of certain land. *B* is entitled to the land.

(b) A, a trustee, wrongfully purchases land in his own name, partly with his own money and partly with money subject to a trust for *B*. *B* is entitled to a charge on the land for the amount of the trust-money so mis-employed.

10. *Saving of rights of certain transfers* (Sec. 64). Nothing in Sec. 63 entitles the beneficiary to any right in respect of property into the hands of—

(a) a transferee in good faith for consideration without having notice of the trust either when the purchase money was paid, or when the conveyance was executed ; or

(b) a transferee for consideration from such a tranferee.

A judgment-creditor of the trustee attaching and purchasing trust property is not a transferee for consideration within the meaning of Sec. 64. Further, nothing in Sec. 63 applies to money, currency notes and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation or shall be deemed to affect the liability of a person to whom debt or charge is transferred.

11. *Acquisition by trustee of trust-property wrongfully converted* (Sec. 65). Where a trustee wrongfully sells or otherwise transfers trust-property and afterwards himself becomes the owner of the property, then the property again becomes subject to the trust. This will happen even if there is any want of notice on the part of intervening transferees in good faith for consideration. Thus in *Bovy* v. *Smith*, (1682) 2 Ch. Cas. 124, where a trustee sold lands to a *bona fide* purchaser without notice, and afterwards became himself the owner of the lands, though for a good and valuable consideration, the Court held that the trust ceased to him revived again, and that he was bound to restore the land to the trust.

12. *Right in case of blended property* (Sec. 66). Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

It is the duty of the trustee, wherever the trust-property may be placed, to be always careful not to amalgamate it with his own ; for, if he does, the beneficiary will be held entitled to every portion of the blended property, which the trustee cannot prove to be his own (*Lupton* v. *White*, 15 Ves. 432).

Wrongful employment by partner-trustee of trust property for partnership purposes (Sec. 67)

If a partner, being a trustee, wrongfully employs trust-property in the business or on the account of the partnership, no other partner is liable

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therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust. The partners having such notice are jointly and severally liable for the breach of trust.

Examples. (a) *A* and *B* are partners. *A* dies, having bequeathed all his property to B in trust for *Z*, and appointed *B*, his sole executor. *B*, instead of winding up the affairs of the partnership, retains all the assets in the business. *Z* may compel him, as partner, to account for so much of the profits as are derived from *A*'s share of the capital. *B* is also answerable to *Z* for the improper employment of *A*'s assets.

(b) *A*, a trader, bequeaths his property to *B* in trust for *C*, appoints *B* his sole executor, and dies. *B* enters into partnership with *X and Y* in the same trade, and employs *A*'s assets in the partnership business. *B* gives an indemnity to *X* and *Y* against he claims of *C*. Here *X* and *Y* are jointly liable with *B* to *C* as having knowingly become parties to the breach of trust committed by *B*.

Liability of beneficiary joining in breach of trust (Sec. 68)

Sometimes one of several beneficiaries may—

(a) join in committing a breach of trust, or

(b) knowingly obtain any advantage therefrom without consent of the other beneficiaries, or

(c) become aware of a breach of trust committed or intended to be committed, and may either actually conceal it, or may not, within a reasonable time, take proper steps to protect the interests of the other beneficiaries, or

(d) have deceived the trustee and thereby induced him to commit a breach of trust.

In the above cases, the other beneficiaries are entitled to have all the beneficial interest of the trustee committing any of the above acts impounded as against him and all who claim under him (otherwise than as transferees for consideration without notice of the breach) until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, the provisions of Sec. 68 do not apply to such property during her marriage.

Rights and liabilities of beneficiary's transferee (Sec. 69). Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of transfer.

VACATION OF OFFICE OF TRUSTEE
(Chapter VII, Secs. 70 to 76)

Office how vacated (Sec. 70)

The office of a trustee is vacated by his death or by his discharge from his office.

Discharge of trustee (Sec. 71)

The trustee may be discharged from his office—

(a) by the extinction of the trust ;

(b) by the completion of his duties under the trust ;

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(c) by such means as may be prescribed by the instrument of trust ;

(d) by appointment of a new trustee in his place :

(e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the benficiaries being competent to contract ; or

(f) by the Court to which a petition for his discharge is presented.

Petition to be discharged from trust (Sec. 72). Despite the provisions of Sec. 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office. If the Court finds that there is sufficient reason for such discharge, it may discharge the trustee accordingly, and direct his costs to be paid out of the trust-property. But where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place.

Sec. 11 provides that the trustee is bound to fulfil the purpose of the trust, and to obey the directions of the author of the trust given at the time of the cretion of the trust, except as modified by the consent of all the beneficiaries being competent to contract. Sec. 72 provides that notwithstanding the provisions of Sec. 11, a trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office.

Appointment of new trustees (Sec. 73)

Appointment of new trustees on death, etc. A new trustee can be appointed when—

(1) any person appointed a trustee disclaims, or

(2) any trustee either original or substituted dies, or

(3) the trustee is, for a continuous period of 6 months, absent from India, or

(4) he leaves India for the purpose of residing abroad, or

(5) he is declared an insolvent, or

(6) he desires to be discharged from the trust, or

(7) he refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personaly incapable to act in the trust, or

(8) he accepts an inconsistent trust.

Who may appoint new trustee ? A new trustee may be appointed in place of deceased, disclaiming, retiring or refusing trustee by—

(a) the person nominated for that purpose by the instrument of trust (if any), or

(b) the author of the trust, if he be alive and competent to contract, or

(c) the surviving or continuing trustees or trustee for the time being, or legal represenative of the last surviving and continuing trustee, or

(d) with the consent of the Court, or the retiring trustees, if they all retire simultaneously, or the last retiring trustee.

Appointment to be by writing. Every appointment of a new trustee shall be by writing under the hand of the person making it.

Increase in number of trustees. On an appointment of a new trustee the number of trustees may be increased.

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Appointment of Official Trustee. The Official Trustee may be appointed under Sec. 73 in any case in which only one trustee is to be the sole trustee. He can however be appointed with his consent, and by the order of the Court.

Dead and continuing trustee. The provisions of Sec. 73 relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator. Further the provisions of this Section relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the trust.

Appointment by Court (Sec. 74)

Application by beneficiary. Where a trustee cannot be appointed under Sec. 73, any beneficiary may, without instituting a suit, apply by petition to a principal Civil Court of original jurisdiction for the appointment of a trustee or a new trustee. On such an application being made, the Court may appoint a trustee or new trustee accordingly.

Considerations taken into account by Court. In appointing new trustees, the Court shall have regard—

(a) to the wishes of the author of the trust as expressed in, or to be inferred from, the instrument of trust ;

(b) to the wishes of the persons, if any, empowered to appoint new trustees ;

(c) to the question whether the appointment will promote or impede the execution of the trust ; and

(d) where there are more beneficiaries than one, to the interest of all such beneficaries.

Vesting of trust-property in new trustees (Sec. 75)

Whenever any new trustee is appointed under Sec. 73 or Sec. 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee or in the legal representative of any trustee, shall become vested in such new trustee, as the case may require.

Powers of new trustees. Every new trustee so appointed, and every trustee appointed by a Court, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Survival of trust (Sec. 76)

On the death or discharge of one of several co-trustees, the trust survives and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

EXTINCTION AND REVOCATION OF TRUSTS
(Chapter VIII, Secs. 77 to 79)

Extinction of trusts (Secs. 77)

A trust is extinguished—

(a) when its purpose is completely fulfilled ; or.

Thus where property is given to trustees in trust to apply the income towards the maintenance and education of *B*, the only child of *A*, and to pass

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on the property to *B* on attaining of majority and the property passes to him, the trust is extinguished.

(b) when its purpose becomes unlawful ; or

As to when the purpose of the trust can be said to be unlawful, refer to Sec. 4, discussed earlier in this Chapter.

(c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise ; or

Thus, where owing to the trust-property having been lost or destroyed, there was nothing left to apply towards the purposes of the trust, it was held that the trust was extinguished [*Frith* v. *Cartland*, 34. L.J. Ch. 301].

(d) when the trust, being recovable, is expressly revoked.

As to when a trust can be revoked, refer to Sec. 78 discussed below.

Revocation of trust (Sec. 78)

A trust created by will be revoked at the pleasure of the testator.

A trust created otherwise can be revoked only—

(a) by the consent of all the beneficiaries if they are competent to contract ;

(b) in exercise of a power of revocation expressly reserved by the author of the trust if the trust has been declared by a non-testamentary instrument or by word of mouth ;

(c) at the pleasure of the author of the rest if the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors.

Clause *(c)* applies only to a trust solely for the payment of *debts* and not to a trust-deed created for payment of debts and other purposes [*Sharf-uz-Zaman* v. *Sir Henry Stanyson*, A.I.R. (1923) Oudh 80].

Example. A conveys property to *B* in trust to sell the same and pay out of the proceeds the claims of *A*'s creditors. *A* reserves no power of revocation. If no communication has been made to the creditors. *A* may revoke the trust. But if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

Revocation not to defeat what trustees have duly done (Sec. 79)

No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

OBLIGATIONS IN THE NATURE OF TRUST
(Chapter IX, Secs. 80 to 96)

An obligation in the nature of a trust is created in the following cases (Sec. 80) :

1. *Where it does not appear that transferor intended to dispose of beneficial interest* (Sec. 81). Where the owner of a property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the benefical interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

Examples. (a) A conveys land to *B* without consideration and declares no trust of any part. It cannot, consistently with the circumstances under which

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the transfer is made, be inferred that *A* intended to transfer the beneficial interest in the land. *B* holds the land for the benefit of *A*.

(b) *A* conveys to *B* 2 fields , *X* and *Y* , and declares a trust of *X* but says nothing about *Y*. It cannot, consistently with the circumstances under which the transfer is made, be inferred that *A* intended to transfer the benefical interest in *Y*. *B* holds *Y* for the benefit of *A*.

2. *Transfer to one for consideration paid by another* (Sec. 82). A property may be transferred to a person, say *X*, for a consideration paid or provided by another person say, *Y*. If it appears that such other person *(i.e., Y* did not intend to pay or provide such consideration for the benefit of the transferee *(X)*, the transferee *(X)* must hold the property for the benefit of the person *(Y)* paying or providing the consideration.

3. *Trust incapable of execution or executed without exhausting trust-property* (Sec. 83). A trust may sometimes be incapable of being executed, or may be completely executed without exhausting the trust-property. In such a case, the trustee, in the absence of a direction to the contrary, must hold the trust-property, or so much thereof as is unexhausted, for the benefit of the author of the trust or his legal representative.

Example. *A* conveys certain land to *B*—

(a) 'upon trust', and no trust is declared.

(b) 'upon trust to be thereafter declared'and no such declaration is ever made.

(c) 'upon trust' that is too vague to be executed.

(d) 'upon trust' that becomes incapable of taking effect.

(e) 'in trust for *C*' and *C* renounces his interest under the trust.

In each of the above cases, B holds the land for the benefit of A.

4. *Transfer or bequest (gift of personal property by will) for legal purpose* (Secs. 84 and 85). (1) *Transfer for illegal purpose* (Sec. 84). In any one of the following circumstances, the transferee of property must hold it for the benefit of the transferor :

(a) Where the owner of the property transfers it to another for an illegal purpose, and such purpose is not carried into execution ; or

(b) Where the property has been transferred for an illegal purpose and the transferor is not as guilty as the transferee ; or

(c) Where the property has been transferred for an illegal purpose and such purpose is not carried into execution but the effect of permitting the transferee to retain the property might be to defeat the provisions of any law.

(2) *Bequest for illegal purpose* (Sec. 85). The legatee of the property (bequeathed to him by the testator upon trust) must hold the property for the benefit of the testator's legal representative in the following circumstances :

(a) Where the purpose of the trust appears on the face of the will to be unlawful ;

(b) Where during the testator's life-time the legatee agrees with him to apply the property for an unlawful purpose ;

(c) Where the revocation of the bequest is prevented by coercion.

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5. *Transfer pursuant to rescindable contract* (Sec. 86). Sometimes a property may be transferred in pursuance of a contract which is liable to rescission, or which is induced by fraud or mistake. In such a case, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor subject to repayment by the latter of the consideration actually paid.

6. *Debtor becoming creditor's representative* (Sec. 87). Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

7. *Advantage gained by fiduciary* (Sec. 88). Where a trustee, executor, partner, agent, director of a company, legal advisor, or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, he must hold it for the benefit of such other person. Likewise, if any person standing in the fiduciary character as aforesaid enters into any dealings under circumstances in which his own interests are, or may be, adverse to the interest of another person and thereby gains for himself any pecuniary advantage, he must hold it for the benefit of that person.

Examples. (a) *A*, an executor, buys at an undervalue from *B*, a legatee, his claim under the will. *B* is ignorant of the value of the bequest. *A* must hold for the benefit of *B* the difference between the price and value.

(b) *A*, a trustee, uses the trust-property for the purpose of his own business. *A* holds for the benefit of his beneficiary the profits arising from such user.

(c) *A*, a partner, buys land in his own name with funds belonging to the partnership. *A* holds such land for the benefit of the partnership.

(d) *A*, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. *A* holds the lakh for the benefit of the partnership.

(e) *A* and *B* are partners. *A* dies. *B* instead of winding up the affairs of the partnership retains all the assets in the business. *B* must account to *A*'s legal representative for the profits arising from *A*'s share of the capital.

(f) *A*, anagent employed to obtain a lease for *B*, obtains the lease for himself. *A* holds the lease for the benefit of *B*.

8. *Advantage gained by exercise of undue influence* (Sec. 89). Where by the exercise of undue influence, any advantage is gained in derogation of the interest of another, the person gaining such advantage without consideration must hold the advantage for the benefit of the person whose interests have been so prejudiced.

9. *Advantage gained by qualified owner* (Sec. 90). Sometimes a tenant for life, co-owner, mortgagee or other qualified owner of any property, may, by availing himself of his position as such, gain an advantage in derogation of the rights of the other person interested in the property. In such a case he must hold the advantage so gained for the benefit of all persons so interested. The other interested persons are subject to repayment of their due share of the expenses properly incurred and to an indemnity by the same persons against liabilities properly contracted in gaining such advantage.

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Examples. (a) *A*, a tenant for life of a leasehold property, renews the lease in his own name and for his own benefit. He holds the renewed lease for the benefit of all those interested in the old lease.

(b) A village belongs to a Hindu family. *A*, one of its members, pays *nazrana* to Government and thereby procures his name to be entered as the *inamdar* of the village. *A* holds the village for the benefit of himself and the other members of the family.

10. *Property acquired with notice of existing contract* (Sec.91). Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

11. *Purchase by person contracting to buy property to be held on trust* (Sec. 91). Where a person contracts to buy property to be held on trust for certain beneficiaries and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

12. *Advantage secretly gained by one of several compounding creditors* (Sec. 93). Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold, for the benefit of such creditors, the advantage so gained.

13. *Constructive trusts in cases not expressly provided for* (Sec. 94). In cases other than those dicussed above (*i.e.*, cases coming within the scope of Secs. 81 to 93) where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof to the extent necessary to satisfy their just demands.

Examples. (a) *A*, an executor, distributes the assets of his testator *B* to the legatees without having paid the whole of *B*'s debts. The legatees hold for the benefit of *B*'s creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b) *A* by mistake assumes the character of trustee for *B*, and under colour of the trust receives certain money. *B* may compel him to account for such moneys.

(c) *A* makes a gift of a lakh of rupees to *B*, reserving to himself, with *B*'s assent, power to revoke at pleasure the gift as to Rs. 10,000. The gift is void as to Rs. 10,00, and *B* holds that sum for the benefit of *A*.

Obligor's duties, liabilities and disabilities

The person holding property in accordance with any of the preceding Sections *i.e.*, Secs. 81 to 94 must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities, as if he were a trustee of the property for the person for whose benefit he holds it. But—

(a) where he rightfully cultivates the property or employs it in trade or busiess, he is entitled to reasonable remuneration for his trouble, skill and loss of time in such cultivation or employment ; and

(b) where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may without the permission of the Court, buy or become lessee or mortgagee of the property or any part thereof.

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Saving of rights of *bona fide* purchasers (Sec. 96)

Nothing contained in this Chapter (Chapter IX, Secs. 80 to 95) shall impair the rights of transferees in good faith for consideration, or create an obligation in evasion of any law for the time being in force.

TEST QUESTIONS

1. What is a trust ? How is a trust created ?
2. What are the essential elements of a valid trust ? Who may create a trust ? Who can be appointed a trustee ?
3. Discuss the various types of trusts.
4. Distinguish between a public thrust and a private trust. *(C.S.E. June 1989)*
5. How is trust of movable or immovable property created ? *(C.S.E. December 1990)*
6. When may a trustee delegate his duties ? *(C.S.E. June 1992)*
7. What is meant by breach of trust ? Discuss the liabilities of a trustee for breach of trust.
8. Discuss the duties of a trustee. What is the care required of him ?
9. State the rights and powers of a trustee.
10. Discuss the disabilities of a trustee. *(C.S.E. December 1992)*
11. When is the office of a trustee vacated ? When and how is a new trustee appointed ?
12. How and when is a trust revoked and extinguished ?
13. When and what kind of trusts can be revoked ? *(C.S.E. December, 1989)*
14. Write a note on 'certainities of a trust'. *(C.S.E. June 1990)*
15. "A trustee shall not profit by his trust." Comment and state if there are any exceptions to this rule.
16. In which circumstances may a trustee renounce the trust ?
17. What are the obligations in the nature of trust ?

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. *A*, a trustee for *B*, kept the cash belonging to the trust in his own house wih other money of his own, where it was stolen by his servant. Is *A* liable to make good the loss to *B* ? *(C.S.E. June 1987)*

[Hint : No. Sec. 15].

2. *A*, living in Calcutta, is a trustee for *B*, living in Bombay. *A* remits trust fund to *B* by bills drawn by a person of undoubted credit in favour of the trustee as such, and payable at Bombay. The bills are dishonoured. Is *A* bound to make good the loss to *B* ? *(C.S.E. December 1987)*

[Hint : No. Sec. 15].

3. *A*, a trustee for *B* and her children, is directed by the author of the trust to lend on *B*'s request trust property to *B*'s husband *C* on the security of his bond. *C* becomes insolvent and *B* requests *A* to make the loan. Can A refuse to make it ? *(C.S.E. December 1989)*

[Hint : Yes. Sec. 11].

4. *A* bequeaths certain property to *B* requesting him to distribute it amongst such members of *C*'s family as *B* should think most deserving. Does this create a trust ? *(C.S.E. December 1990, June 1988)*

[Hint : No. Sec. 6].

5. *A* bequeaths certain property to *B* desiring him to divide the bulk of it among *C*'s children. Is it a valid trust ? *(C.S.E. December 1988)*

[Hint : No. Sec. 6]

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6. A trustee of a trust commits two breaches at the instance of one of the beneficiaries. While there is a gain in one transaction, there is a loss in another. Explain whether the loss can be set-off against the gain. *(C.S.E. June 1991)*

[Hint : The loss cannot be set off against gain (Sec. 27)].

7. *A* transfers his property in trust in favour of *B* with a direction that the trust property be used for the business of contraband opium and out of the profits of this business maintenance may be given to *A's* children. Is this a valid trust ? *(C.S.E. December 1992)*

[Hint : No, Sec. 4].

8. *A* transfers a sum of Rs. 1,00,000 to *B* with the request that the money should be used for the benefit of the poor students according to a scheme to be communicated later. A dies without framing the scheme. Is any valid trust created in this case ? *(C.S.E., June 1993)*

[Hint : No, Sec. 11].

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12

The Societies Registration Act, 1860

Corporate associations formed for commercial purposes are registered under the Companies Act, 1956. Such associations may also be formed for promoting art, charity, research, religion, commerce or any other useful purpose. The Societies Registration Act, 1860 was passed for the registration of such associations or societies in order to give them the status of a corporation or a legal person.

The preamble of the Act states that the Act was passed with the object of improving the legal condition of societies established for the promotion of literature, science, or the fine arts, for the diffusion of useful knowledge, the diffusion of political education, or for charitable purposes. The various provisions in the Act make it clear that the Act applies to all societies formed or to be formed under the Act in order to give them the legal status of a corporation for carrying out the purposes for which they were formed or to be formed [*Harinarayan Shaw* v. *Gobardhandas Shroff*, A.I.R. (1953) Cal. 140].

The Act has its origin in the English Law and is based on the English Literary and Scientific Institutions Act, 1854. It is a Central Act, though the subject-matter is included in the State List in the Constitution of India. As such many States have made several alterations and additions in the Central Act by their own amending Acts.

Reference To Sections

Unless otherwise stated, reference to Sections in this Chapter is to the Societies Registration Act, 1860.

Constitutional position

Article 19 of the Constitution guarantees to the citizens of India 6 fundamental freedoms which are exercisable by them throughout the territory of India. One of these freedoms is to form associations and unions [Article 19 (1) *(c)* of the Constitution]. This necessarily includes the right to form a society or a body for the purpose of establishing and administering an educational institution [*Bapuji Educational Assn.* v. *State*, A.I.R. (1986) Kar. 119]. The right to form associations implies that several individuals having a community of interest get together and form voluntarily an association with a common aim and legitimate purpose.

The right to form associations or unions is however not unrestrained. Article 19 (4) of the Constitution empowers the State to impose reasonable restrictions on the exercise of the fundamental right to form associations or unions in the interests of the sovereignty and integrity of India or public order or morality. The expression 'public order' is virtually synonymous with public peace, safety and tranquillity [*O.K. Ghosh* v. *E.X. Joseph*, A.I.R. (1963) S.C. 812].

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SOCIETIES WHICH MAY BE REGISTERED UNDER THE ACT (Sec. 20)

The societies that may be registered under the Act are charitable societies, the military orphan funds or societies established at the several presidencies of India, societies established for the promotion of science, literature, or the fine arts, for instruction, the diffusion of useful knowledge, or the diffusion of political education, the foundation or maintenance of libraries or reading rooms for general use among the members or open to the public, or public museums and galleries of paintings and other work of art, collections of natural history, mechanical inventions, instruments or designs.

The expression 'charitable purposes' has been defined in the Charitable Endowments Act, 1890 (Sec.2) as including "relief of the poor, education, medical relief and the advancement of any other object of general public utility but not including a purpose which relates exclusively to religious teaching or worship." This definition excludes a purpose which relates exclusively to religious teaching or worship.

The qeustion whether a society formed both for charitable and religious purposes is registerable or not under the Act came up for consideration in *Khaja Muhammad Hussain* v. *Majidary Mahamood Jamait Managing Committee*, A.I.R. (1940) Mad. 167. It was held in this case that it was unnecessary to go into the question whether an exclusively religious purpose is a charitable purpose and whether a society formed for such a purpose should be a charitable society within the meaning of the Act. Where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious would not render the society less charitable. The Allahabad High Court also held that a society for religious purposes would ordinarily be a society for charitable purposes [*Anjuman Islamia of Mathura* v. *Nasiruddin*, A.I.R. (1955) S.C. 74]. But societies for recreation or enjoyment as distinguished from instruction are not covered by the Act.

MODE OF FORMATION OF A SOCIETY (Secs. 1 to 3)

Societies formed by Memorandum of Association and registration (Sec. 1). Any 7 or more persons associated for any such purpose as described in Sec. 20 (discussed above) may form themselves into a society under the Act. They can do so by subscribing their names to a Memorandum of Association and filing the same with the Registrar of Joint Stock Companies.

Memorandum of Association (Sec. 2). The Memorandum of Association of a society is the most fundamental document. Being the charter of the society, it sets out its constitution. It defines the relation of the society with the outside world and the scope of its activities. It enables the members and outsiders who deal with it to know what its permitted range of activities is. It, in a way, both defines and confines the scope of its activities. Any act done by the society beyond the scope of its activities as given in the Memorandum is *ultra vires* the society.

The Memorandum of Association shall state :

(1) the name of the society ;

(2) the object of the society ;

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(3) the names, addresses, and occupations of the governors, council, directors, committee, or other govering body to whom by the rules of the society, the management of its affairs is entrusted.

A copy of the rules and regulations of the society, certified to be a correct copy by not less than 3 of the members of the governing body, has also to be filed with the Memorandum of Association.

If the rules and regulations of a society are inconsistent with the provisions of this Act, they are invalid, and the fact that they are filed with the Memorandum of Association with the registering authority *(i.e.,* Registrar of Companies) for the purpose of registration of the society cannot make them valid [*Radhaswamy Satsang Sabha* v. *Tara Chand,* A.I.R. (1939) All. 557].

Registration and fees (Sec. 3). Upon the Memorandum and certified copy of rules and regulations of the society being filed, the Registrar certifies under his hand that the society is registered under the Act. There is to be paid to the Registrar for every such registration a fee of Rs. 50, or such smaller fee as the State Government, may, from time to time, direct.

When the Registrar is satisfied that a society has complied with the statutory requirements as to registration, he issues an acknowledgement in the form of a certificate of registration. The certificate is conclusive evidence of due registration. It is however not a conclusive evidence of the legality of the rules of the society or whether the society is a society within the provisions of the Act.

Effect of registration. When a society is registered under the Act, it becomes a body corporate with perpetual sucession and a common seal. It also becomes a legal person with separate existence distinct from its members [*Bacha F. Guzdar* v. *Commr. of Income-tax,* A.I.R. (1955) S.C. 74], and can acquire and hold property and sue and be sued [*Boppana Rukmniamma* v. *M.V. Ramdas,* (1940) 2 M.L.J. 455]. In the absence of registration the society has no legal status, and as such it cannot sue or be sued (S.*D. Chawre* v. *Chawre Jain Boarding,* A.I.R. (1934) Nag. 207]. A non-registered society does not exist in the eyes of the law.

Alteration of the objects (Sec. 12)

Sec. 12 provides for the alteration of the purpose or objects for which the society is formed with a view to alter, extend or abridge them within the meaning and scope of the Act. It also provides for the amalgamation of such society either wholly or partially with any other society. The procedure for doing so is as follows :

The governing body of the society has to submit the proposition to the members of the society in a written or printed report. It may also convene a special meeting for the consideration of the report according to the regulations of the society. The report shall be delivered or sent by post to every member of the society 10 days previous to the special meeting convened by the governing body for the consideration thereof. The members present at such meeting must agree to the proposition by three-fifths of the votes delivered in person or by proxy and confirmed by the votes of three-fifths of the members present at a second special meeting convened by the governing body at an interval of 1 month after the former meeting.

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MISCELLANEOUS

Member and governing body defined (Secs. 15 and 16)

Member defined (Sec. 15). A member of a society registered under the Act shall be a person who, having been admitted therein according to the rules and regulations thereof, shall have paid a subscription, or shall have signed the roll or list of the members thereof, and shall not have resigned in accordance with such rules and regulations. But in all proceedings under the Act no person shall be entitled to vote or be counted as a member whose subscription at the time shall have been in arrear for a period exceeding 3 months.

Governing body defined (Sec. 16). The governing body of the society shall be the governors, council, directors, committee, trustees, or other body to whom by the rules and regulations of the society the management of its affairs is entrusted.

The persons who constitute the governing body of a society are responsible for the management of the society. The property of the society, if not vested in the trustees, is vested in the governing body. The members of the governing body are the agents of the society, and hence if they act fraudulently, they would be liable for misconduct [*Ranger* v. *Great Western Rail.*, (1854) 5 H.L.C. 85].

Annual list of managing body to be filed (Sec. 4). Once in every year within 14 days of the annual general meaning of the society (or if the rules do not provide for an annual general meeting, then in the month of January), a list is to be filed with the Registrar of Joint Stock Companies, of the names addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Property of society (Secs. 5 and 8)

Property how vested (Sec. 5). The property, movable and inmovable, belonging to a society registered under the Act shall vest in trustees, if so appointed. If the trustees are not appointed, the property of the society shall be deemed to be vested, for the time being, in the governing body of the society. In all proceedings, civil and criminal, the property may be described as the property of the governing body of such society by its proper title. The fact that property is deemed to be vested in the trustees or governing body does not constitute any beneficial interest of the trustees or governing body in the property and the property must be deemed to be the property of the society [*Harinarayan Shaw* v. *Gobardhandas Shroff*, A.I.R. (1958) Cal. 140].

Enforcement of judgment against society (Sec. 8). A judgment obtained against the society shall be in force against the body the society and not against the body of of the person or officer sued for the society or against such person's property.

The application for execution shall set forth the judgment, the fact of the party against whom it shall have been been recovered having sued or having been sued, as the case may be, on behalf of the society only, and shall require to have the judgment enforced against the property of the society.

Suits (Secs. 6 and 7)

Suits by and against societies (Sec. 6). Every society registered under the Act may sue or be sued in the name of the president, chairman, or principal

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secretary, or trustees, as is determined by the rules and regulations of the society. In default of any such determination, the society may sue or be sued in the name of any such person as shall be appointed by the governing body for the occasion. Further, it shall be competent for any person having a claim or demand against the society to sue the president or chairman or the principal secretary or the trustee of the society. He can however do so if, on application to the governing body, some other officer of the society or person is not nominated to be the defendant.

A property, which was vested in the trustees of an unregistered society before registraton of the society, becomes after the registration of the society, the property belonging to the society and must be deemed to be the property of the society. As a matter of fact and strictly speaking there is no transfer of ownership. That which belonged to an unregistered society continues after the change in status of that society on being registered, as belonging to the registered society [*Harinarayan Shaw* v. *Gobardhandas Shroff*, A.I.R. (1958) Cal. 140].

Suit not to abate (Sec. 7). A registered society becomes a body corporate with permanent existence and perpetual succession. Notwithstanding that the members of the society or its governing body fluctuate from time to time, the existence and identity of the society remains perpetual and continuous under the provisions of the Act. Sec. 7 makes it clear that the death or retirement from office of a plaintiff or defendant does not cause the abatement or discontinuance of civil proceedings brought by or against a society and the proceedings are continued in the name of or against the successor of such person.

Recovery of penalty accruing under bye-law (Sec. 9)

Whenever by any bye-law of a society, any pecuniary penalty is imposed for the breach of any rule or bye-law of the society, such penalty, when accrued, may be recovered in any Court having jurisdiction, where the defendant resides, or the society is situate, as the governing body may deem expedient. The bye-law according to which such penalty is imposed should have been duly made in accordance with the rules and regulations of the society. Where the rules do not provide for the making of bye-laws, such bye-law should have been made at a general meeting of the members of the society convened for the purpose. For making any such bye-law, the concurrent votes of three-fifths of the members present at such meeting shall be necessary.

Liability of members (Secs. 10 and 11)

Members liable to be sued as strangers (Sec. 10). A person who is in arrear of a subscription which according to the rules of society he is bound to pay may be sued for recovery of arrears of subscription. Likewise if he has possessed, detained, injured or destroyed any property of the society contrary to the rules of the society, he may be sued for any damange or injury to the property of the society as a stranger or for any offence against it.

In any suit or other proceeding brought against a member at the instance of the society, the member may be successful and may be adjudged to recover his cost. In such a case, he may elect to proceed to recover the cost from the officer in whose name the proceedings were taken or against property of the society. The officer in whose name the proceedings are taken on behalf of the society is deemed to be an 'agent' of the society.

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Members guilty of offences punishable as strangers (Sec. 11). A member of a society shall be subject to prosecution like a stranger if he—

(a) steals, purloins (appropriates wrongfully), or embezzles any money or other property of such society, or

(b) wilfully and maliciously destroys or injures any property of such society, or

Where a person wilfully does an act which is injurious to another without any lawful excuse, he does it maliciously. Stated in another way, the term 'maliciously' implies an intention to do an act which is wrongful to the deteriment of another [*Biraj Prasad Ray* v. *Nagendra Nath*, (1985) Cutt. L.T. 144].

(c) forges any deed, bond, security for money, receipt or other instrument, whereby the funds of the society may be exposed to loss.

The member guilty of any of the above offences shall be subject to the same prosecution, and if convicted, shall be liable to be punished like a stranger.

Inspection of documents (Sec. 19)

Any person may inspect all documents filed with the Registrar under this Act on a payment of a fee of Re. 1 for each inspection. Further, any person may get a copy or extract of any document or any part of any document, duly certified by the Registrar, on payment of two annas (twelve and a half paise) for every hundred words of such copy or extract. Such certified copy shall be *prima facie* evidence of the matters therein contained in all legal proceedings whatever.

DISSOLUTION OF SOCIETY
(Secs. 13 and 14)

Provision for dissolution and adjustment of affairs (Ses. 13). A society may be dissolved voluntarily if not less than three-fifths of the members of the society determine that it shall be dissolved. Upon such determination, the society shall be dissolved forthwith or at the time agreed upon. After this, all necessary steps shall be taken for the disposal and settlement of the property of the society, its claims and liabilities, according to the rules of the society, if any, and if there are no rules, then as the governing body shall find expedient. In the event of any dispute arising among the governing body or the members of the society, the matter shall be referred to the principal Court of original civil jurisdiction of the district in which the chief building (*i.e.*, the principal office) of the society is situate and the Court shall make such order in the matter as it shall deem requisite.

It may be noted that a society shall not be dissolved *unless* three-fifths of the members shall have expessed a wish for such dissolution by their votes delivered in person, or by proxy at a general meeting convened for the purpose.

If any Government is a member of, or a contributor to, or otherwise interested in any society registered under the Act, such a society cannot be dissolved without the consent of the Government of the State of registration.

No member to receive profit (Sec. 14). If upon the dissolution of a society registered under the Act, there remains after the satisfaction of all its debts

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and liabilities, any propery whatsoever, the same is not to be paid to or distributed among the members of the society. It is, however, given to some other society to be determined by the votes of not less than three-fifths of the members present personally or by proxy at the time of the dissolution or by the Court. This provision does not apply to any society which is founded or established by the contributions of shareholders in the nature of a joint stock company.

REGISTRATION UNDER THE COMPANIES ACT, 1956

The Companies Act, 1956 also provides for the registration of associations not for profit for promoting commerce, art, science, religion, or any other useful object. The registration of associations under the Companies Act, 1956 and the Societies Registration Act, 1860 may now be contrasted.

The procedure of registration under the Companies Act is more complicated and cumbersome and the fees to be paid for registration are also larger. Moreover the provisions of the Companies Act are more stringent in spite of certain exemptions. On dissolution, the surplus assets of the society registered under the Companies Act are distributed among the shareholders. But in the case of a society registered under the Societies Registration Act the members have no proprietary or beneficial interest in the property of the society and as such they cannot, upon the dissolution of the society, claim any interest in the surplus property of the society. The surplus property, if any, on dissolution of the society has to transfered to some other society with similar objects.

TEST QUESTIONS

1. What types of societies can be registered under the Societies Registration Act, 1860 ? What are the advantages of registering them under this Act ?

2. Describe the procedure for the formation and registration of societies under the Societies Registration Act, 1860. *(C.S.E. June 1987, December 1990, 1991)*

3. Discuss the status of a society registered under the Societies Registration Act, 1860. *(C.S.E. December 1986)*

4. Some residents of your locality want to set up a reading room for the public, by starting a charitable society. They consult you in the matter and want you to complete the necessary formalities. What procedure will you adopt for registering such a society ?

5. Describe the procedure for amendement of Memorandam of Association of a society registered under the Societies Registration Act, 1860. *(C.S.E. June 1991)*

6. How can the societies alter, extend or abridge their powers ? *(C.S.E. June 1989)*

7. What are he distinct advantages of registering a society under the Societies Registration Act, 1860, as compared to registration of societies under Sec. 25 of the Companies Act, 1956 ?

8. A recreation club wishes to be incorporated. Can it do so *(a)* under the Societies Registration Act, 1860, or *(b)* without the use of of the world 'Limited' under the Companies Act, 1956 ?

9. How does the property of the societies vest under the Societies Registration Act, 1880 ?

10. How are surplus assets dealt with on the dissolution of a society registered under the Societies Registration Act, 1860 ?

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11. Write short note on : Dissolution of Societies. *(C.S.E., December 1992)*

12. A society registered under the Societies Registration Act, 1860 is plagued with infights amongst its members. The society has a lot of property. What steps will you suggest to prevent its misuse by the office-bearers ? *(C.S.E., June 1990)*

PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. The President of Mahalaxmi Industries Association files a suit against the previous honorary treasurer with the ulterior motive of maligning him. The suit is dismissed by the Court. What remedies are available to him against the President of Mahalaxmi Industries Association ? *(C.S.E. December 1986)*

[Hint : He can sue for damages for malicious prosecution. Under Sec. 10 he can recover the costs either from the office-bearers or from the society].

2. *P* becomes a member of a society and regularly pays his subscription upto March, 1993. Thereafter he fails to pay any subscription. In a meeting of the society convened on December 30, 1993, *P* is not permitted to participate in the meeting and to cast his vote. Is this action justificed ? *(C.S.E. June 1993, modified)*

[Hint : Yes, as the subscription is in arrear for more than 3 months. Sec. 15].

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Co-operative law

A co-operative (or co-operative society) is manifestation of corporate enterprise. It is an organisation owned by and operated for the benefit of those using its services. The most distinguishing feature of a co-operative society is : "One member, one vote."

The law relating to co-operative societies whose objects are confined to one State is contained in the law enacted by that State. The law relating to co-operative societies whose objects are confined to more than one State is contained in the following two all-India Acts :

1. The Co-operative Societies Act, 1912, and
2. The Multi-State Co-operative Societies Act, 1984.

The important provisions of these Acts are discussed below.

THE CO-OPERATIVE SOCIETIES ACT, 1912

The Co-operative Societies Act, 1912 is a Central legislation which extends to the whole of India [Sec. 1 (2)]. It was passed to facilitate the formation of co-operative societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means (Premble to the Act). As today every State has its own Co-operative Societies Act.

Reference to Sections

Reference to Sections in this part of the Chapter, unless otherwise indicated, is to the Co-operative Societies Act, 1912 (referred to as the Act).

DEFINITIONS
(Sec. 2)

1 *Bye-laws* [Sec. 2 *(a)*]. 'Bye-laws' means the registered bye-laws for the time being in force, and includes a registered amendment of the bye-laws.

2. *Committee* [Sec. 2 *(b)*]. 'Committee' means the governing body of a registered society to whom the management of its affairs is entrusted.

3. *Member* [Sec. 2 *(c)*]. 'Member' includes a person joining in the application for the registration of a society and a person admitted to membership after registration in accordance with the bye-laws and any rules.

4. *Officer* [Sec. 2 *(d)*]. 'Officer' includes a chairman, secretary, treasurer, member of committee, or other person empowered under the rules or the bye-laws to give directions in regard to the business of the society.

5. *Registered society* [Sec. 2 *(e)*]. It means a society registered or deemed to be registered under this Act.

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6. *Registrar* [Sec. 2 *(f)*]. 'Registrar' means a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act.

7. *Rules* (Sec. 2 *(g)*]. 'Rules' means rules made under this Act.

REGISTRATION
(Secs. 3 to 7)

The Registrar (Sec. 3). The administration of the Act has been entrusted to the State Governments.

Sec. 3 empowers a State Government to appoint a person to be Registrar of Co-operative Societies for the State or any portion of it. Further the State Government may appoint persons to assist the Registrar. It may, by general or special order, confer on any such persons all or any of the powers of a Registrar under this Act.

Societies which may be registered (Sec. 4). A society which may be registered under the Act may be—

(a) a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles, or

(b) a society established with the object of facilitating the operations of such a society.

A society may be registered under this Act with or without limited liability. Unless the State Government, by general or special order, otherwise directs—

(1) the liability of a society *of which a member is a registered society* shall be *limited* ;

(2) the liability of a society of which the object is the creation of funds to be lent to its members, and of which the majority of the members are agriculturists and *of which no member is a registered society*, shall be unlimited.

Restriction on interest of members (Sec. 5). Where the liability of the members of a society is limited by shares, no member shall—

(a) hold more than such portion of the share capital of the society as may be prescribed by the rules. This holding is however subject to a maximum of 1/5th of share capital ; or

(b) have or claim any interest in the shares of the society exceeding Rs. 1,000.

The above restrictions do not apply where the member of a society is a registered society.

Conditions of registration (Sec. 6). A society can be registered under the Act if—

(a) it consists of at least 10 persons above the age of 18 years, and

(b) the object of the society is the creation of funds to be lent to its members.

The members must—

(a) reside in the same town or village or in the same group of villages ; or

(b) save where the Registrar otherwise directs, belong to the same tribe, class, caste or occupation.

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The above rule does not apply to a society of which a member is a registered society.

The word 'limited' shall be the last word in the name of every society with limited liability registered under this Act.

Power of Registrar to decide certain questions (Sec. 7). When any of the following questions arises, it shall be decided by the Registrar. These questions may be—

(a) whether for the purposes of this Act a person is an agriculturist or a non-agriculturist, or

(b) whether any person is a resident in a town or village or group of villages, or

(c) whether 2 or more villages shall be considered to form a group, or

(d) whether any person belongs to any particular tribe, class or occupation.

The decision of the Registrar on the above questions shall be final.

PROCEDURE FOR REGISTRATION
(Secs. 8 to 11)

Application for registration (Sec. 8). For the purposes of registration of a co-operative society under the Act, an application shall be made to the Registrar. The application shall be signed—

(a) in the case of a society of which no member is a registered society, by at least 10 persons ; and

(b) in the case of a society of which a member is a registered society, by a duly authorised person on behalf of every such registered society, and where all the members of the society are not registered societies, by 10 other members. When the number of other members is less than 10, the application shall be signed by all of them.

Copy of bye-laws. The application shall be accompanied by a copy of the proposed bye-laws of the society.

Information to Registrar. The persons by whom or on whose behalf the application for registration is made shall furnish such information in regard to the society as the Registrar may require.

Certificate of registration (Sec. 9). If the Registrar is satisfied that a society has complied with the provisions of this Act and the rules and that its proposed bye-laws are not contrary to the Act or to the rules, he may, if he thinks fit, register the society and its bye-laws. He shall then issue a certificate of registration duly signed by him.

Evidence of registration (Sec. 10). A certificate of registration signed by the Registrar shall be conclusive evidence that the society therein mentioned is duly registered unless it is proved that the registration of the society has been cancelled.

Amendment of the bye-laws of a registered society (Sec. 11). An amendment of the bye-laws of a registered society shall not be valid until the same has been registered under this Act. For this purpose, a copy of the amendment shall be forwarded to the Registrar.

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Registration of amendment. If the Registrar is satisfied that any amendment of the bye-laws is not contrary to this Act or to the rules, he may, if he thinks fit, register the amendment.

Issue of copy of amendment to society. When the Registrar registers an amendment of the bye-laws of a registered society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence that the same is duly registered.

RIGHTS AND LIABILITIES OF MEMBERS
(Secs. 12 to 14)

1. *Member not to exercise rights till due payment is made* (Sec.12). A member of a registered society shall not be eligible to exercise the rights of a member unless and until he has—

(a) paid his membership fee, or

(b) acquired such interest in the society, as may be prescribed by the rules or bye-laws.

2. *Votes* (Sec. 13). Where the liability of the members of a registered society is not limited by shares, each member shall have one vote only as a member in the affairs of the society. Where the liability of the members of a registered society is limited by shares, each member shall have as many votes as may be prescribed by the by-laws.

Proxy. A registered society which has invested any part of its funds in the shares of any other registered society may appoint any one of its members as its proxy for the purpose of voting in the affairs of such other registered society.

3. *Restrictions on transfer of shares* (Sec. 14). The transfer of the share or interest of a member in the capital of a registered society shall be subject to such conditions as to maximum holding as may be prescribed.

In case of a society registered with unlimited liability a member shall not transfer any share held by him or his interest in the capital of the society or any part thereof unless—

(a) he has held such share or interest for at least 1 year ; and

(b) the transfer is made to the society or to a member of the society.

DUTIES OF REGISTERED SOCIETIES
(Secs. 15 to 17)

1. *Address of society* (Sec. 15). Every society shall have an address registered in accordance with the rules, to which all notices and communications may be sent. The society shall send to the Registrar notice of every change in its address.

2. *Copy of Act, rules and bye-laws to be open to inspection* (Sec. 16). Every registered society shall keep a copy of this Act and of the rules governing the society, and of its bye-laws, open to inspection free of charge at all reasonable times at the registered address of the society.

3. *Audit* (Sec. 17). The Registrar shall audit or cause to be audited by some person authorised by him by general or special order in writing in this behalf the accounts of every registered society once at least in every year. The

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audit shal include an examination of over-due debts, if any, and a valuation of the assets and liabilities of the society.

Access to books, papers, etc. The Registrar, the Collector or any person authorised by general or special order in writing in this behalf by the Registrar shall at all times have access to all the books, accounts, papers and securities of a society. Further every officer of the society shall furnish such information in regard to the transactions and working of the society as the person making inspection may require.

PRIVILEGES OF REGISTERED SOCIETIES
(Secs. 18 to 28)

1. *Societies to be bodies* corporate (Sec. 18). On registration, a society becomes a body corporate by the name under which it is registered with perpetual succession and a common seal. Further it acquires the power—

(a) to hold property,

(b) to enter into contracts,

(c) to institute and defend suits and other legal proceedings, and

(d) to do all things necessary for the purposes of its constitution.

2. *Prior claim of society* (Sec. 19). A registered society shall be entitled in priority to other creditors to enforce any outstanding demand due to the society from a member or past member—

(a) in respect of the supply of seed or manure or the loan of money for the purchase of seed or manure—upon the crops or other agricultural produce of such member or person at any time within 18 months from the date of such supply or loan ;

(b) in respect of the supply of cattle, fodder for cattle, agricultural or industrial implements or machinery, or raw materials for manufacture, or of the loan of money for the purchase of any of the foregoing things—upon any such things so supplied, or purchased in whole or in part from any such loan, or on any articles manufactured from raw materials so supplied or purchased.

The above claims of the society are however subject to any prior claim of the Government in respect of land-revenue or any money recoverable as land-revenue or of a landlord in respect of rent or any money recoverable as rent.

3. *Charge and set-off in respect of shares or interest of member* (Sec. 20). A registered society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member in respect of any debt due from such member or past member to the society. Further, the society may set-off any sum credited or payable to a member or past member in or towards payment of any such debt. This right of the society to set-off also extends to any dividend, bonus or profits payable to a member or past member.

4. *Share or interest not liable to attachment* (Sec. 21). The share or interest of a member in the capital of a registered society shall not be liable to attachment or sale under any decree or order of a Court in respect of any debt or liability incurred by such member. Further neither the Official Assignee under the Presidency-towns Insolvency Act, 1909, nor a Receiver under the Provincial Insolvency Act, 1920 shall be entitled to or have any claim

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on such share or interest. This rule is however subject to the provisions of Sec. 20 discussed above.

5. *Transfer of interest on the death of a member* (Sec. 22). On the death of a member, a registered society may transfer the share or interest of the deceased member to the person nominated in accordance with the rules made in this behalf. If there is no nominee, the society may—

(a) transfer the share or interest of the deceased member to such person as may appear to the committee to be the heir or legal representative of the deceased member, or

(b) pay to such nominee, heir or legal representative a sum representing the value of such member's share or interest, as ascertained in accordance with the rules or bye-laws.

Rights of the nominee, heir or legal representative. (1) In the case of a society with unlimited liability, the nominee, heir or legal representative may require payment to him by the society of the value of the share or interest of the deceased member ascertained in accordance with the rules or bye-laws.

(2) In the case of a society with limited liability, the society shall transfer the share or interest of the deceased member to the nominee, heir or legal representative, being qualified in accordance with the rules and bye-laws for membership of the society, or on his application within 1 month of the death of the deceased member to any person specified in application who is so qualified.

Other moneys. A registered society may pay all other moneys due to the deceased member from the society to the nominee, heir or legal representative, as the case may be.

Transfers and payments valid against demands of other persons. All transfers and payments made by a registered society in accordance with the provisions of Sec. 22 shall be valid and effectual against any demand made upon the society by any other person.

6. *Liability of past members* (Sec. 23). The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of 2 years from the date of his ceasing to be a member.

7. *Liability of the estate of a deceased member* (Sec. 24). The estate of a deceased member shall be liable for a period of 1 year from the time of his death for the debts of a registered society as they existed at the time of his death.

8. *Register of members* (Sec. 25). Any register or list of members or shares kept by a registered society shall be *pima facie* evidence of any of the following particulars entered therein :—

(a) the date at which the name of any person was entered in such register or list as a member ;

(b) the date at which any such person ceased to be a member.

Proof of entries in society's books (Sec. 26). A copy of any entry in a book of a registered society regularly kept in the course of business shall, if certified in the prescribed manner, be received, in any suit or legal proceeding, as *prima facie* evidence of the existence of such entry. Further, such entry shall be

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admitted as evidence of the matters, transactions and accounts recorded in the book.

9. *Exemption from compulsory registration of instrume . .* (Sec. 27). The following instruments shall not require compulsory registration under the Indian Registration Act, 1908 :

(1) Any instrument relating to shares in a registered society, notwithstanding that the assets of such society consist in whole or in part of immovable property ; or

(2) Any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or

(3) Any endorsement upon or transfer of any debenture issued by any such society.

10. *Remission from income-tax, stamp duty and registration fees* (Sec. 28). *Remission from income-tax.* The Central Government may, by notification in the Official *Gazette*, remit the income-tax payable in respect of the profit of any registered society or class of registered societies, or of the dividends or other payments received by the members of the society on account of profits.

Remission of stamp-duty and registration fee. The State Government may, by notification in the Official *Gazette*, in the case of any registered society or class of registered societies, remit—

(a) the stamp-duty with which, under any law for the time being in force, instruments executed by or on behalf of a registered society or by an officer or member and relating to the business of such society or any class of such instruments, are respectively chargeable, and

(b) any fee payable under the law of registration for the time being in force.

However, this power of remission in relation to stamp-duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, and in relation to any stamp-duty falling within entry 96 in List I in the Seventh Schedule to the Constitution lies with the Central Government. Entry 96 in List I is as follows :

> "Fees in respect of any of the matters in this List (*i.e.*, List I), but not including fees taken in any court."

PROPERTY AND FUNDS OF REGISTERED SOCIETIES (Secs. 29 to 34)

Restrictions on loans, borrowings and other transactions

Restrictions on loans (Sec. 29). A registered society shall not make a loan to any person other than a member. But with the general or special sanction of the Registrar, it may make loans to another registered society.

A society with unlimited liability shall not lend money on the security of movable property. It may however do so with the sanction of the Registrar.

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The State Government may, by general or special order, prohibit or restrict the lending of money on mortgage of immovable property by any registered society or class of registered societies.

Restriction on borrowing (Sec. 30). A registered society shall not receive deposits and loans from persons who are not members except to such extent and under such conditions as may be prescribed by the rules or bye-laws.

Restrictions on other transactions with non-members (Sec. 31). The transactions of a registered society with persons other than members shall be subject to such prohibitions and restrictions, if any, as the State Government may, by rules, prescribe. This is however subject to the provisions of Secs. 29 and 30.

Investment of funds (Sec. 32)

A registered society may invest or deposit its funds—

(a) in the Government Savings Bank, or

(b) in any of the securities specified in Sec. 20 of the Indian Trusts Act, 1882, or

These securities are those which are issued by the Central Government, State Governments or in units issued by the Unit Trust of India.

(c) in the shares or on the security of any other registered society, or

(d) with any bank or person carrying on the business of banking approved for this purpose by the Registrar, or

(e) in any other mode permitted by the rules

Funds not to be divided by way of profit (Sec. 33). The funds of a registered society cannot be divided by way of bonus or dividend or otherwise among its members. Every registered society has to transfer at least 1/4th of the net profits in any year to a reserve fund. Payments from the remainder of such profits and from any profits of past years available for distribution may be made among the members to such extent and under such conditions as may be prescribed by the rules or bye-laws. Further in the case of a society with unlimited liability no distribution of profits shall be made without the general or special order of the State Government in this behalf.

Contribution to charitable purposes (Sec. 34). Any registered society may, with the sanction of the Registrar, after 1/4th of the net profits in any year has been carried to a reserve fund, contribute an amount up to 10 per cent of the remaining net profits to any charitable purpose, as defined in Sec. 2 of the Charitable Endowments Act, 1890.

INSPECTION OF AFFAIRS
(Secs. 35 to 38)

Inquiry by Registrar (Sec. 35). The Registrar may hold an inquiry or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial conditions of a registered society. The Registrar may hold or direct the holding of such an inquiry of his own motion. He *shall* hold or direct the holding of such an inquiry on the request of the Collector, or on the application of a majority of the committee, or of not less than 1/3rd of the members.

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All officers and members of the society shall furnish such information in regard to the affairs of the society as the Registrar or the person authorised by the Registrar may require.

Inspection of books of indebted society (Sec. 36). The Registrar shall, on the application of a creditor of a registered society which owes a debt to him, inspect or direct some person authorised by him by order in writing in this behalf to inspect the books of the society. But before the Registrar inspects or directs some person to inspect the books of the society,—

(a) the applicant shall satisfy the Registrar that the debt is a sum then due, and that he had demanded payment thereof and has not received satisfaction within a reasonable time ; and

(b) the applicant shall deposit with the Registrar such sum as security for the costs of the proposed inspection as the Registrar may require.

The Registrar shall communicate the results of any such inspection to the creditor.

Cost of inqutry (Sec. 37). Where an inquiry is held under Sec. 35. or an inspection is made under Sec. 36, the Registrar may apportion the costs, or such part of the costs as he may think right, between the society, the members or creditor demanding an inquiry or inspection, and the officers or former officers of the society.

Recovery of costs (Sec. 38). Any sum awarded by way of cost under Sec. 37 may be recovered, on application to a Magistrate having jurisdiction in the place where the person from whom the money is claimable actually and voluntarily resides or carries on business, by the distress and sale of the movable property within the limits of the jurisdiction of such Magistrate belonging to such person.

DISSOLUTION OF SOCIETY
(Secs. 39 to 42)

Dissolution of a society takes place by cancellation of its registration by the Registrar.

Cancellation of registration. The Registrar may cancel the registration of a society in the following two cases :

1. *Cancellation after inquiry or inspection or on application by members* (Sec. 39). If the Registrar, after an inquiry has been held under Sec. 35 or after an inspection has been made under Sec. 36, is of opinion that the society ought to be dissolved, he may cancel the registration of the society. He may also cancel the registration on receipt of an application made by 3/4ths of the members of a registered society.

Appeal. Any member of the society may, within 2 months from the date of an order of cancellation of registration by the Registrar, appeal from such order. Where no appeal is presented the order shall take effect on the expiry of 2 months. Where an appeal is presented within 2 months, the order shall not take effect until it is confirmed by the appellate authority.

Appellate authority. The authority to which appeals under this Section shall lie shall be the State Government. The State Government may, by

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notification in the Official *Gazette*, direct that appeals shall lie to such Revenue-authority as may be specified in the notification.

2. *Cancellation where the number of members falls below 10* (Sec. 40). Where it is a condition of the registration of a society that it should consist of at least 10 members, the Registrar may, by order in writing, cancel the registration of the society if at any time it is proved to his satisfaction that the number of the members has been reduced to less than 10.

Effect of cancellation of registration (Sec. 41). Where the registration of a society is cancelled, the society shall cease to exist as a corporate body—

(a) in the case of cancellation in accordance with the provisions of Sec. 39, from the date the order of cancellation takes effect ;

(b) in the case of cancellation in accordance with the provisions of Sec. 40, from the date of the order of cancellation.

Winding up (Sec. 42). *Appointment of liquidator.* Where the registration of a society is cancelled under Sec. 39 or Sec. 40, the Registrar may appoint a competent person to be liquidator of the society.

Powers of liquidator. A liquidator shall have power—

(a) to institute and defend suits and other legal proceedings on behalf of the society by his name of office ;

(b) to determine the contribution to be made by the members and past members of the society respectively to the assets of the society ;

(c) to investigate all claims against the society and, subject to the provisions of this Act, to decide questions of priority arising between claimants ;

(d) to determine by what persons and in what proportions the costs of the liquidation are to be borne ; and

(e) to give such directions in regard to the collection and distribution of the assets of the society, as may appear to him to be necessary for winding up the affairs of the society.

Power to summon witnesses, etc. Subject to any rules, a liquidator shall, in so far such powers are necessary for carrying out the purposes of Sec. 42, have power to summon and enforce the attendance of witnesses and to compel the production of documents by the same means and (so far as may be) in the same manner as is provided in the case of a Civil Court under the Code of Civil Procedure, 1908.

Appeal. Where an appeal from any order made by a liquidator is provided for by the rules, it shall lie to the Court of the District Judge.

Enforcement of orders. Orders made under Sec. 42 shall, on application, be enforced as follows :—

(a) when made by a liquidator, by any Civil Court having local jurisdiction in the same manner as a decree of such Court.

(b) when made by the Court of the District Judge on appeal, in the same manner as a decree of such Court made in any suit pending therein.

Bar on Civil Courts. Save in so far as is expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act.

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RULES
(Sec. 43)

Rule-making power. The State Government may, for the whole or any part of the State and for any registered society or class of such societies, make rules to carry out the purposes of this Act.

Delegation of powers. The State Government may delegate, subject to such conditions, if any, as it thinks fit, all or any if its powers to make rules under this Section to authority specified in the order of delegation.

Provious publication. The power to make rules conferred by this Section is subject to the condition of the rules being made after previous publication.

Publication in Official Gazette. All rules published in the Official *Gazette* and on such publication shall have effect as if enacted in this Act.

MESCELLANEOUS
(Secs. 44 to 48)

Recovery of sums due to Government (Sec. 44). All sums due from a registered society or from an officer or member or past member of a registered society as such to the Government, including any costs awarded to the Government under Sec. 37, may be recovered in the same manner as arrears of land-revenue.

Sums due from a registered society to Government and recoverable under Sec. 44 may be recovered—

firstly, from the property of the society :

secondly, in the case of a society of which the liability of the members is limited, from the members subject to the limit of their liability ; and

thirdly, in the case of other societies, from the members.

Power to exempt societies from conditions as to registration (Sec. 45). Notwithstanding anything contained in this Act, the State Government may, by a special order in each case and subject to such conditions, if any, as it may impose, exempt any society from any of the requirements of this Act as to registration.

Power to exempt registered societies from provisions of the Act (Sec. 46). The State Government may, by general or speical order, exempt any registered society form any of the provisions of this Act or may direct that such provisions shall apply to such society with such modifications as may be specified in the order.

Prohibition of the use of the word "co-operative" (Sec. 47). No person other than a registered society shall trade or carry on business under any name or title of which the word "co-operative" is part without the sanction of the State Government.

Penalty. Whoever contravenes the provisions of this Section shall be punishable with fine which may extend to Rs. 50 and in the case of a continuing offence with further fine of Rs. 5 for each day on which the offence is continued after conviction therefor.

Companies Act, 1956 not to apply (Sec. 48). The provisions of the Compantes Act, 1956 shall not apply to registered societies.

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THE MULTI-STATE CO-OPERATIVE SOCIETIES ACT, 1984

Prior to the passing of this Act co-operative societies with objects not confined to one State serving the interest of more than one State were governed by the provisions of Multi-unit Co-operative Societies Act, 1942 (which has now been repealed).

Since 1942 far-reaching changes have occurred in the organisational structure, overall size and operations etc. of multi-unit co-operative societies. A number of national level co-operative societies and federations (their number was 192 in 1991), promoted by co-operatives in the country have come up with the assistance of the Central and State Governments. These federations are engaged in diverse spheres of co-operative activities. The provisions in the co-operative laws in different States governing these multi-State societies tended to vary from one another. This lack of uniformity and inadequacies in the existing arrangements rendered it necessary to replace the existing legislative framework of such co-operatives by a common Central legislation. The present Multi-State Co-operative Societies Act, 1984 seeks to achieve this objective and is intended to facilitate the further development and more effective functioning of multi-State co-operative societies.

The Act came into force on 16th September, 1985

Reference to Sections and Rules

Reference to Sections in this part of the Chapter is to the Multi-State Co-operative Societies Act, 1984, (in short, the Act), unless otherwise indicated. Likewise reference to "Rules" and "Audit Rules" is to the Multi-State Co-operative Societies (Registration, Membership, Direction and Management, Settlement of Disputes, Appeals, Revisions) Rules, 1985 (in short the Rules), and the Multi-State Co-operative Societies (Privileges, Properties and Funds, Accounts, Audit, Winding up and Execution of Dercrees, Orders and Decisions) Rules, 1985 (in short the Audit Rules) respectively.

Application (Sec. 2)

This Act shall apply to—

(a) all co-operative societies, with objects not confined to one State, which were incorporated before the commencement of this Act ;

(i) under the Co-operative Societies Act. 1912,

(ii) under any other law relating to co-operative societies in force in any State or in pursuance of the Multi-unit Co-operative Societies Act, 1942.

and the registration of which has not been cancelled before such commencement ; and

(b) all multi-State co-operative societies.

DEFINITIONS
(Sec. 3)

In this Act, unless the context otherwise requires,—

1. *Board* [Sec. 2 *(a)*]. It means the Board of Directors or the governing body of a multi-State co-operative society by whatever name called, to which the direction and control of management of the affairs of the society is entrusted.

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2. *Bye-laws* [Sec. 2 *(b)*]. "Bye-laws" means the bye-laws for the time being in force which have been duly registered under this Act and includes amendments thereto which have been duly registered under this Act.

3. *Central Registrar* [Sec. 2 *(c)*]. "Central Registrar" means the Central Registrar of Co-operative Societies appointed under Sec. 4 and includes any officer empowered to exercise the powers of the Central Registrar.

4. *Chief Executive* [Sec. 2 *(d)*]. "Chief Executive" means a Chief Executive of a multi-State co-operative society appointed under Sec. 44.

5. *Co-operative bank* [Sec. 2. *(e)*]. It means a multi-State co-operative society which undertakes banking business.

6. *Co-operative principles* [Sec. 2 *(f)*]. "Co-operative principles" means the co-operative principles specified in the First Schedule to the Act which is reproduced below :

THE FIRST SCHEDULE
Co-operative principles

(1) Membership of a multi-State co-operative society (hereafter in this Schedule referred to as the society) should be voluntary and open without any social, political, or religious discrimination, to all persons who can make use of its services.

(2) In a society other than that with institutional membership, individual member should enjoy equal rights of voting—one member, one vote.

(3) *(i)* Surplus or savings, if any, arising out of the operations of the society belong to the society as a whole, and no individual member has a claim to the surplus.

(ii) The surplus should be utilised for all or any of the following purposes, namely :

(a) providing for development of the business of the society ;

(b) providing services for the common enjoyment of members ;

(c) distribution among the members in proportion to their transactions with the society.

(4) The society should undertake education of its members, office-bearers and employees and the general public regarding the principles and practice of co-operation.

(5) The society should actively co-operate in every practical way with other co-operative societies at local, national or international levels.

(6) The share capital of the society shall receive strictly limited rate of interest (that is to say dividend).

(7) The affairs of the society should be administered by the management in accordance with democratically expressed will of the members.

(8) The management of the society is accountable to its own members.

7. *Co-operative society* [Sec. 2 *(g)*]. It means a society registered or deemed to be registered under any law relating to the co-operative societies for the time being in force in any State

8. *Co-operative year* [Sec. 2 *(h)*]. The "co-operative year", in relation to any multi-State co-operative society or class of such societies, means the year ending on the 30th day of June. Where the accounts of such society or class of such societies are, with the previous sanction of the Central Registrar, balanced on any other day, "co-operative year" means the year ending on such day.

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9. *Deposit Insurance Corporation* [Sec. 2 *(i)*]. It means the Deposit Insurance and Credit Guarantee Corporation established under the Deposit Insurance Corporation Act, 1961.

10. *Member* [Sec. 2 *(j)*]. "Member" means a person joining in the application for the registration of a multi-State co-operative society and includes a person admitted to membership after such registration in accordance with the provisions of this Act, the rules and the bye-laws.

11. *Multi-State co-operative society* [Sec. 2 *(k)*]. It means a society registered or deemed to be registered under this Act and includes a national co-operative society.

12. *Multi-State co-operative society with limited liability* [Sec. 2 *(l)*]. It means a society having the liability of its members limited by its bye-laws to the amount, if any, unpaid on the shares respectively, held by them or to such amount as they may undertake to contribute to the assets of the society, in the event of its being wound up.

13. *National co-operative society* [Sec. 2 *(m)*]. It means a multi-State co-operative society specified in the Second Schedule to the Act which is reproduced below :

THE SECOND SCHEDULE
List of National Co-operative Societies

1. National Co-operative Land Development Banks Federation Limited, Hyderabad.
2. National Federation of State Co-operation Banks Limited, Bombay.
3. National Co-operative Union of India Limited, New Delhi.
4. National Agricultural Co-operative Marketing Federation of India Limited, New Delhi.
5. National Co-operative Consumers' Federation of India Limited, New Delhi.
6. National Federation of Co-operative Sugar Factories Limited, New Delhi.
7. National Federation of Industrial Co-operatives Limited, New Delhi.
8. National Co-operative Housing Federation Limited, New Delhi.
9. Indian Farmers' Fertilisers Co-operative Limited, New Delhi.
10. All-India Federation of Co-operative Spinning Mills Limited, Bombay.
11. All-India Industrial Co-operative Banks Federation Limited, Bangalore.
12. National Co-operative Dairy Federation of India Limited, New Delhi.
13. Petrofils Co-operative Limited, New Delhi.
14. National Heavy Engineering Co-operative Limited, New Delhi.
15. The All-India Handloom Fabrics Marketing Co-operative Society Limited, Bombay.
16. The National Federation of Urban Co-operative Banks and Credit Societies Limited, New Delhi.
17. Krishak Bharati Co-operative Limited, New Delhi.
18. National Federation of Fishermen's Co-operative Limited, New Delhi.
19. National Federation of Labour Co-operatives Limited, New Delhi.
20. National Co-operative Tobacco Growers' Federation Limited.

14. *Notification* [Sec. 2 *(n)*]. It means a notification published in the Official *Gazette*.

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15. *Officer* [Sec. 2 *(o)*]. "Officer" means a president, vice-president, chairman, vice-chairman, managing director, secretary, manager, member of a Board, treasurer, liquidator, an administrator appointed under Sec. 48 and includes any other person empowered under this Act or the rules or the bye-laws to give directions in regard to the business of a multi-State co-operative society.

16. *Prescribed* [Sec. 2 *(p)*]. It means prescribed by rules.

17. *Reserve Bank* [Sec. 2 *(q)*]. "Reserve Bank" means the Reserve Bank of India constituted under the Reserve Bank of India Act, 1934.

18. *Rules* [Sec. 2 *(r)*]. "Rules" means the rules made under this Act.

CENTRAL REGISTRAR AND REGISTRATION OF SOCIETIES

Central Registrar (Sec. 4). Sec. 4 empowers the Central Government to appoint a person to be the Central Registrar of Co-operative Societies and to appoint such other persons as it may think fit to assist the Central Registrar.

The Central Government may, by notification, direct that any power exercisable by the Central Registrar (other than the power of a multi-State co-operative society) shall be exercisable also by any other officer of the Central Government or of a State Government as may be authorised by the Central Government. However no officer of a State Government shall be empowered to exercise any such power in relation to a national co-operative society (as specified in Schedule II).

Further no officer of a State Government below the rank of the Registrar of Co-operative Societies shall be empowered to exercise any power exercisable by the Central Registrar under Sec. 87.

Multi-State co-operative societies which may be registered (Sec. 5). No multi-State co-operative society shall be registered under this Act, unless the main objects of the society are to serve the interests of members in more than one State.

Subject to the above condition a multi-State co-operative society which has as its object the promotion of the economic and social betterment of its members through mutual aid in accordance with the co-operative principles or a multi-State co-operative society established with the object of facilitations of other such societies or of co-operative societies or of both may be registered under this Act.

The word "Limited" or its equivalent in any Indian language shall be suffixed to the name of every multi-State co-operative society registered under this Act with limited liability.

Registration procedure

Application for registration (Sec. 6). For the purposes of registration of a multi-State co-operative society, an application shall be made to the Central Registrar in prescribed form. The application shall be signed—

(a) in the case of a multi-State co-operative society of which all the members are individuals, by at least 50 persons from each of the States concerned ;

(b) in the case of a multi-State co-operative society of which the members are co-operative societies, by duly authorised representatives on

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behalf of at least two such soieties as are not registered in the same State ; and

(c) in the case of a multi-State co-operative society of which another multi-State co-operative society and other co-operative societies are members, by duly authorised representatives of each of such societies.

It should be noted that not less than two of the co-operative societies referred to in Clause *(b)* or Clause *(c)*, as the case may be, shall be such as are not registered in the same State.

The application shall be accompanied by 4 copies of the proposed bye-laws of the multi-State co-operative society. Further, the person by whom or on whose behalf such application is made shall furnish such information in regard to the society as the Central Registrar may require.

According to Rule 3 of the Rules, the application for Registration shall be in Form I.

Registration (Sec. 7). The Central Registrar may register the multi-State co-operative society and its bye-laws if he is satisfied that—

(a) the application complies with the provisions of this Act and the rules ;

(b) the proposed multi-State co-operative society satisfies the basic criterion that its objects are to serve the interests of members in more than one State ;

(c) that there is no other multi-State co-operative society having similar area of operation and identical objects ;

(d) that the proposed bye-laws are not contrary to the provisions of this Act and the rules ; and

(e) that the proposed multi-State co-operative society has reasonable prospects of becoming a viable unit.

Where the Central Registrar refuses to register a multi-State co-operative society, he shall communicate the order of refusal together with the reasons therefor, to such number of the applicants and in such manner as may be prescribed.

Disposal of application. The application for registration shall be disposed of by the Central Registrar within a perioa of 6 months from the date of receipt thereof by him. If he is unable to dispose of the application within 6 months, he shall make a report to the Central Government stating the reasons for his inability to do so. The Central Government may extend the period for disposal of such application.

Registration certificate (Sec. 8). Where a multi-State co-operative society is registered under this Act, the Central Registrar shall issue a certificate of registration signed by him, which shall be conclusive evidence that the society mentioned in the certificate is duly registered under this Act, unless it is proved that the registration of the society has been cancelled.

Bye-laws

Bye-laws are the rules and regulations for the administration and management of a co-operative society (or any other organisation). They are binding on all persons who come within their scope. To be valid, they must be *intra*

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vires, reasonable, certain and must not be retrospective or repugnant to the general law of the land.

According to Sec. 6, an application for registration of a multi-State co-operative society has to be accompanied by 4 copies of its bye-laws. According to Rule 7 of the Rules, a multi-State co-operative society may make bye-laws in respect of the following matters :

(1) the name and registered address of the multi-State co-operative society and its branches ;

(2) the area of operation ;

(3) the objects for which the multi-State co-operative society is established and the purpose for which its funds may be applied ;

(4) the terms and qualifications for admission and withdrawal of membership.

(5) the privileges, rights, duties and liabilities of members including nominal members. However, the nominal members shall not be entitled to any share in any form whatsoever in the assets or profits of the multi-State co-operative society and shall not have a right to vote ;

(6) the consequence for default in payment of any sum due by members ;

(7) the procedure for withdrawal, removal or expulsion of members ;

(8) the manner in which and the limits upto which the funds of the society may be raised, the maximum share capital which any member may hold and the purpose for which the funds may be utilised ;

(9) the mode of appointment and removal of the directors and other officers of the multi-State co-operative society and the duties and powers of the Board ;

(10) the mode of convening and conducting annual and special meetings of the general body and of the Board, issue of notices and the business which may be transacted thereat ;

(11) the disposal of net profits ;

(12) the manner of making, altering and abrogating bye-laws ;

(13) the powers, duties and functions of the Chairman or President and his removal on his losing support of the majority ;

(14) the powers and duties of the chief executive in addition to those mentioned in Sec. 45 ;

(15) the authorisation of an officer or officers to sign documents and to institute and defend suits and other legal proceedings on behalf of the multi-State co-operative society ;

(16) the mode of custody and investment of funds ;

(17) the mode of keeping the accounts ;

(18) the strength of the Board ;

(19) the manner in which penalty may be levied on a member found guilty of breach of the bye-laws ;

(20) the appointment of a provisional Board, wherever necessary ;

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(21) the manner of sending notices ;

(22) the creation or use of reserve funds ;

(23) the purpose for which surplus if any shall be utilised in the event of the winding-up of the multi-State co-operative society ;

(24) the conduct of elections to the Board and other bodies of a multi-State co-operative society including the number of members to be elected by different constituencies and appointment of returning officers ;

(25) the procedure to be followed in cases of withdrawal, ineligibility and death of members ;

(26) the conditions, if any, under which the transfer of share or interest of a member may be permitted ;

(27) the method of appropriating payments made by members from whom moneys are due ;

(28) the constitution and maintenance of various funds to be maintained under the provisions of the Act or rules ;

(29) the constitution of a representative general body consisting of delegates or members of the multi-State co-operative society and the method of election of such delegates to exercise the powers of the general body ;

(30) the mode of conducting business such as manufacture, purchase, stock-taking and other allied matters ;

(31) in the case of co-operative banks and multi-State thrift and credit societies,—

(a) the maximum loan admissible per member ;

(b) the maximum rate of interest on loans to members ;

(c) the conditions on which loans may be granted to members ;

(d) the procedure for grant of loans and advances and for the grant of extension of time and for repayment of such loans, advances, etc. ;

(e) the circumstances under which a loan may be recalled.

Amendment of bye-laws of multi-State co-operative society (Sec. 9). No amendment of any bye-laws of a multi-State co-operative society shall be valid unless such amendment has been registered under this Act.

Forwarding of proposal to Central Registrar. Every proposal for amendment of bye-laws shall be forwarded to the Central Registrar. The Central Registrar may register the amendment within a period of 6 months from the date of receipt thereof by him, if he is satisfied that the proposed amendment—

(a) is not contrary to the provisions of this Act or of the rules ;

(b) does not conflict with co-operative principles ; and

(c) will promote the economic interests of the members of the multi-State co-operative society.

If the Central Registrar is unable to register the amendment within 6 months, he shall make a report to the Central Government stating the reasons for his inability to do so. The Central Government may extend the period for registration of the amendment.

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The Central Registrar shall forward to the multi-State co-operative society a copy of the registered amendment together with a certificate signed by him. Such certificate shall be conclusive evidence that the amendment has been duly registered.

Refusal to register amendment—its communication. Where the Central Registrar refuses to register an amendment of the bye-laws of a multi-State co-operative society, he shall communicate the order of refusal together with the reasons therefor to the Chief Executive of the society within 7 days from the date of such refusal.

When amendment of bye-laws comes into force (Sec. 10). An amendment of the bye-laws of a multi-State co-operative society shall, unless it is expressed to come into operation on a particular day, come into force on the day on which it is registered.

Change of name (Sec. 11)

A multi-State co-operative society may, by an amendment of its bye-laws, change its name. Such change shall however not affect any right or obligation of the multi-State co-operative society or of any of its members, or past members. Further any legal proceedings which might have been continued or commenced by or against the multi-State co-operative society by its former name may be continued or commenced by or against its new name.

Where a multi-State co-operative society changes its name, the Central Registrar shall enter the new name on the register of multi-State co-operative societies in place of the former name. He shall also amend the certificate of registration accordingly.

Change of address (Sec. 12)

Every multi-State co-operative society shall have a principal place of business and a registered address to which all notices and communications may be sent. Any change in the principal place of business of multi-State co-operative society shall be made with the previous approval of the Central Registrar.

MEMBERS OF MULTI-STATE CO-OPERATIVE SOCIETIES AND THEIR RIGHTS AND LIABILITIES

Persons who may become members (Sec. 19)

No person shall be admitted as member of a multi-State co-operative society except the following, namely :

(a) an individual competent to contract under Sec. 11 of the Indian Contract Act, 1872 ;

(b) any multi-State co-operative society or any co-operative society :

(c) the Central Government ;

(d) a State Government ;

(e) the National Co-operative Development Corporation established under the National Co-operative Development Corporation Act, 1962 ;

(f) any other corporation owned or controlled by Government ;

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(g) any Government company as defined in Sec. 617 of the Companies Act, 1956 ;

(h) such class or classes of persons or association of persons as may be permitted by the Central Registrar having regard to the nature and activities of a multi-State co-operative society.

Such number of individuals possessing such qualifications as may be prescribed may be admitted as members of the National Co-operative Union of India Limited, New Delhi.

Application for membership. Any person eligible for membership of a multi-State co-operative society may, on his application, be admitted as a member by such society. Such application shall be disposed of by such society within a period of 4 months from the date of receipt of the application. The decision of the society on the application shall be communicated to the applicant within 15 days from the date of such decision.

If the application is not disposed of within 4 months, or the decision is not communicated within a period of 15 days of the expiry of the aforesaid period of 4 months the multi-State co-operative society shall be deemed to have made a decision, on the date of expiry of such period, refusing admission to the applicant.

Disqualification. Sometimes the interest of a person or class of persons conflicts or is likely to conflict with the objects of any multi-State co-operative societies. In such a case, the Central Government may, by general or special order published in the Official *Gazette*, declare that any such person or class of persons engaged in or carrying on any profession, business or employment shall be disqualified from being admitted, or for continuing, as members or shall be eligible for membership only to a limited extent of any specified multi-State co-operative society or class of multi-State co-operative societies. This disqualification will apply so long as such person or persons is or are engaged in or carrying on that profession, business or employment, as the case may be.

Conditions to be complied with for admission. Rule 11 of the Rules lays down the following conditions to be complied with for admission for membership :

(1) No person shall be admitted as a member of a multi-State co-operative society unless,—

(a) he has applied in writing in the form, if any, laid down by the multi-State co-operative society or in the form specified by the Central Registrar, if any, for membership ;

(b) his application is approved by the Board of the multi-State co-operative society ;

(c) he has purchased the minimum number of shares and paid the value thereof in full or in part in such calls as may be laid down in the bye-laws of the multi-State co-operative society ;

(d) he has fulfilled all other conditions laid down in the Act, the rules and the bye-laws ;

(e) in the case of a multi-State co-operative society or a co-operative society or the national co-operative society or any other corporation owned or

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controlled by the Government or any Government company or body of persons whether incorporated or not, the application for membership shall be accompanied by a resolution authorising it to apply for such membership.

(2) No person shall be eligible for admission as a member of a multi-State co-operative society if he—

(a) has not attained the age of 18 years ;

(b) has been adjudged by a competent Court to be an insolvent or an undischarged insolvent ;

(c) has been sentenced in any offence, other than offence of a political character or an offence not involving moral turpitude and dishonesty and a period of 5 years has not elapsed from the date of expiry of the sentence.

(3) Notwithstanding anything contained in these rules or the bye-laws of the multi-State co-operative society, if a member becomes or has already become subject to any disqualifications specified in Para (2), he shall be deemed to have ceased to be a member of the society from the date when the disqualification was incurred.

(4) No individual being a member of a primary level multi-State co-operative society or a multi-State credit society, or a multi-State urban co-operative bank, shall be the member of any other multi-State co-operative society or co-operative society of the same class without the general or special permission of the Central Registrar. Where an individual has become a member of two such co-operative societies aforesaid, then either or both of the societies shall be bound to remove him from membership on written requisition from the Central Registrar to that effect.

(5) No multi-State co-operative society shall admit members within 30 days prior to the date of the meeting of its general body.

Members not to exercise rights till due payment made (Sec. 20). No member of a multi-State co-operative society shall exercise the rights of a member, unless he has made such payments to the society in respect of membership, or has acquired such interest in the society, as may be specified in the bye-laws.

Expulsion of members (Sec. 21)

Two-thirds majority. A multi-State co-operative society may, by resolution passed by a majority of not less than 2/3rds of the members present and voting at a general meeting of members held for the purpose, expel a member for acts which are detrimental to the proper working of the society. However, the member concerned shall not be expelled unless he has been given a reasonable opportunity of making representation in the matter.

Expelled member not eligible for re-admission for 3 years. No member of the multi-State co-operative society who has been expelled shall be eligible for re-admission as a member of that society, for a period of 3 years from the date of such expulsion. However the Central Registrar may, on application of the multi-State co-operative society and if satisfied that in the special circumstances of the case it is necessary so to do in the interest of the multi-State co-operative society, sanction the re-admission within 3 years of any such member as a member of the society.

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Votes of members (Sec. 22)

Every member of a multi-State co-operative society, including a member who is an employee of such society, shall have one vote in the affairs of the society. However

(a) a member who is an employee of such society shall not be entitled to vote—

(i) at an election of a member of the Board of such society ;

(ii) in any general meeting convened for framing the bye-law of such society or any amendments thereto ;

(b) in the case of an equality of votes, the Chairman shall have a second or casting vote ;

(c) where the Central Government, a State Government, the National Development Corporation, any other Corporation owned or controlled by Government or any Government company is a member of a multi-State co-operative society, each person nominated by such authroity, on the Board, in accordance with the provisions contained in this Act and the rules, shall have one vote ;

(d) a multi-State co-operative society, the members of which include co-operative societies or other multi-State co-operative societies, may provide for an equitable system of voting having regard to the membership of and the extent of business carried on by such co-operative societies, or multi-State co-operative societies and other relevant circumstances.

Manner of exercising vote (Sec. 23). Every member of a multi-State co-operative society shall exercise his vote in person and no member shall be permitted to vote by proxy. But a multi-State co-operative society or a co-operative society which is a member of another multi-State co-operative society may, subject to the provisions of Sec. 29 and the rules, appoint its representative to vote on its behalf in the affairs of that society.

DIRECTION AND MANAGEMENT OF MULTI-STATE CO-OPERATIVE SOCIETIES

General body, its constitution, powers and functions (Sec. 29)

Constitution. The general body of a multi-State co-operative society shall consist of all the members of such society.

Powers. Where the bye-laws of a multi-State co-operative society provide for the constitution of a smaller body consisting of delegates of members of the society elected or selected in accordance with such bye-laws, that smaller body shall exercise the powers of the general body as may be prescribed.

Ultimate authority. Subject to the provisions of the Act, the rules and the bye-laws, the ultimate authority of a multi-State co-operative society shall vest in the general body of its members. However the Board or any officer of a multi-State co-operative society may exercise any power conferred on it or him by this Act or the rules or the bye-laws.

Representation. In any meeting of the general body or the Board of a multi-State co-operative society, a co-operative society or another multi-State co-operative society may have to be represented. In such in case the co-oper-

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ative society or other multi-State co-operative society shall be represented only through its Chairman or the Chief Executive. Where there is no Board of such co-operative society or other multi-State co-operative society, for whatever reasons, it shall be represented through its administrator, by whatever name called.

Meetings of the general body

1. **Annual general meeting** (Sec. 30). Every multi-State co-operative society shall, within such period as may be prescribed, after the close of the year, call a general meeting of its members in the prescribed manner.

Purpose of the meeting. The annual general meeting shall be called for the purpose of —

(a) consideration of the audit report and annual report ;

(b) disposal of net profits ;

(c) approval of the programme of activities for the ensuing year ;

(d) amendment of bye-laws ;

(e) election, if any, of the members of the Board, other than nominated members, subject to the provisions of Sec. 35.

Statement to be laid before the meeting. At every annual general meeting of a multi-State co-operative society the Board shall lay before the society a statement showing the details of the loans or goods on credit, if any, given to any of the members of the Board or to the spouse or a son or daughter of a member of the Board during the preceding year or outstanding against him or against such spouse or son or daughter of the member of the Board.

Extension of time. The Central Registrar may, by general or special order, extend the period for holding the meeting for a further period not exceeding 3 months.

Calling of meeting by the Central Registrar. If in the opinion of the Central Registrar no extension of time for calling the meeting is necessary or such meeting is not called by the multi-State co-operative society within the extended period, the Central Registrar or any person authorised by him in this behalf may call such meeting in the manner prescribed. Any such meeting shall be deemed to be a general meeting duly called by the society. The Central Registrar may order that expediture incurred in calling such a meeting shall be paid out of the funds of the society or by such person or persons who was or were responsible for the refusal or failure to convene the general meeting.

Period within which meeting to be held (Rule 20). Annual general meeting must be held within 6 months of the close of the co-operative year.

Notice of the meeting (Rule 23). The annual general meeting may be called by giving not less than 14 days' notice in writing. The notice shall be accompanied by a copy each of the audited balance sheet, profit and loss account together with the auditor's report thereon relating to the preceding year and the report of the Board.

Quorum and adjournment (Rule 24). Unless otherwise provided in the bye-laws the quorum for a general meeting shall be 1/5th of the total number of members. No business can be transacted unless there is quorum at the time when the business of the meeting is due to commence. If within half an

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or any part thereof has remained unpaid on the expiry of 6 months from the date of such default ;

(h) is a person against whom any amount due under a decree, decision or order is pending recovery under this Act ;

(i) is retained or employed as a legal practitioner on behalf of or against the multi-State co-operative society, or on behalf of or against any other multi-State co-operative society which is a member of the former society ;

(j) has been convicted for any offences under this Act.

Election of members of Board (Sec. 35). The superintendence, direction and control of the preparation of the electoral rolls for, and conduct of, elections of the members of the Board shall be vested in such returning officers as may be appointed by the Central Registrar in this behalf. No person shall be eligible to be elected as a member of the Board of a multi-State co-operative society unless he is a member of the general body of that society.

Voting by secret ballot. The vote at elections shall be by secret ballot.

Term of office. The term of office of the elected members of the Board shall be such, not exceeding 3 years from the date of election, as may be specified in the bye-laws of a multi-State co-operative society. However the elected members shall continue to hold office till their successors are elected or nominated under the provisions of this Act or the rules or the bye-laws and assume the charge of their office.

Rule-making power. The Central Government may make rules to provide for or to regulate matters in respect of elections of members of the Board.

Holding of office in co-operative society (Sec. 36). No person shall be elgibile to hold, at the same time, office of a president or chairman or vice-president or vice-chairman on the Board of more than one multi-State co-operative society.

Restrictions on holding of office (Sec. 37). No person shall be eligible to hold the office of a president or chairman or vice-president or vice-chairman on the Board of a multi-State co-operative society, after the has held the office during 2 consecutive terms, whether full or part. But a person who has ceased to hold the office of a president or chairman continuously for one full term of 3 years shall again be eligible for the election to the offices aforesaid.

Payment of honorarium (Sec. 38). Honorarium may be paid to the elected chairman or president of the Board out of the profits of the muti-State co-operative society in respect of specific services rendered by him. This is however subject to such restrictions and conditions as may be prescribed.

Removal. *Removal of elected members by general body* (Sec. 39). An elected member of a Board who has acted adversely to the interests of multi-State co-operative society may, on the basis of a report from the Central Registrar or otherwise, be removed from the Board. For removal a resolution of the general body must be passed at its meeting by a majority of not less than 2/3rds of the members present and voting at the meeting. However the member concerned shall not be removed unless be has been given a reasonable opportunity of making representation in the matter.

Removal of member by Central Registrar (Sec. 40). If in spite of cessation of office under circumstances mentioned in Sec. 34, Sec. 36, Sec. 37 or Sec.

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39 a member of the Board refuses to vacate his office, the Central Registrar shall, by order in writing, remove him from such office.

Nominee of Central Government or State Government on the Board (Sec. 41). Where the Central Government or a State Government has subscribed to the share capital of a multi-State co-operative society or has guaranteed the repayment of principal and payment of interest on debentures issued by a multi-State co-operative society or has guaranteed the repayment of principal and payment of interest on loans and advances to a multi-State co-operative society, the Central Government or the State Government shall have the right to nominate on the Board such number of persons as may be prescribed. The person so nominated shall hold office during the pleasure of the Government by which he has been so nominated.

Powers and functions of the Board (Sec. 42). The Board may exercise all such powers as may be necessary or expedient for the purpose of carrying out its functions under this Act. Such power shall include the power—

(a) to admit members ;

(b) to interpret the organisational objectives and set up specific goals to be achieved towards these objectives ;

(c) to make periodic appraisal of operations ;

(d) to appoint a Chief Executive and such other employees of the society (out of the list of persons referred to in Sec. 50) as are not required to be appointed by the Chief Executive ;

(e) to make provisions for regulating the appointment of employees of the multi-State co-operative society and the scales of pay, allowances and other conditions of service of, including disciplinary action against, such employees ;

(f) to approve annual and supplementary budget ;

(g) to acquire or dispose of immovable property ;

(h) to raise funds ;

(i) to sanction loans to the members ; and

(j) to take such other measures or to do such other acts as may be prescribed or required under this Act.

Meetings of the Board (Sec. 43). The Chief Executive shall convene the meetings of the Board at the instance of the chairman or president of the multi-State co-operative society. The total number of meetings of the Board in a year and the venue of meetings may be prescribed. The Board shall meet at least once in every quarter.

Number of meetings (Rule 33). The Board shall meet at least once in every quarter provided however that the total number of meetings should not ordinarily exceed 6 in a year. This provision does not apply to a multi-State thrift and credit society.

Committee of the Board (Sec. 46). The Board may, subject to such conditions as may be prescribed, constitute an Executive Committee and other committees or sub-committees, as may be considered necessary. Each committee shall perform such functions as are assigned to it in accordance with the bye-laws of the multi-State co-operative society.

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Central Government's power to give directions in the public interest (Sec. 47). The Central Government may give directions to any multi-State co-operative society, from time to time, if it is satisfied that it is in the public interest or for the purposes of—

(a) securing proper implementation of co-operative production and other developmental programmes approved or undertaken by the Central Government, or

(b) securing proper management of the business of the multi-State co-operative society generally, or

(c) preventing the affairs of the multi-State co-operative society from being conducted in a manner detrimental to the interests of the members, any depositors or creditors thereof.

The multi-State co-operative societies shall be bound to comply with such directions of the Central Government.

Supersession of Board (Sec. 48). The Central Registrar may remove, by order in writing, the Board of any multi-State co-operative society if in his opinion it—

(a) is persistently making defaul., or

(b) is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws or has committed any act which is prejudicial to the interests of the society or its members, or

(c) has omitted or failed to comply with any directions given to it under Sec. 47, or

(d) there is a stalemate in the constitution or functions of the Board.

Before taking the above step, the Central Registrar shall give the Board an opportunity to state its objections, if any, and consider the objections, if received. He may appoint one or more administrators, who need not be members of the society to manage the affairs of the society for such period not exceeding 1 year, as may be specified in the order. This period of 1 year may, at the discretion of the Central Registrar, be extended from time to time ; so, however, that the aggregate period does not exceed 2 years.

Remuneration of administrator. The Central Registrar may fix such remuneration for the administrators, as he may think fit. The remuneration so fixed shall be paid out of the funds of the multi-State co-operative society.

Functions of the administrator. The administrator shall, subject to the control of the Central Registrar and to such instructions as he may from time to time give, have power to exercise all or any of the functions of the Board or of any officer of the multi-State co-operative society. He shall take all such actions as may be required in the interests of the society.

Constitution of new Board. The administrator shall, before the expiry of his term of office, arrange for the constitution of a new Board in accordance with the bye-laws of the multi-State co-operative society.

If at any time during the period the administrator is in office, the Central Registrar considers it necessary, he may, by order in writing giving reasons therefor, direct the administrator to arrange for the consitution of a new Board

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for such multi-State co-operative society in accordance with the bye-laws of the society. Immediately on the constitution of the new Board, the administrator shall hand over the management of the society to such newly constituted Board and cease to function.

Acts of multi-State co-operative societies not to be invalidated by certain defects (Sec 51). No act of a multi-State co-operative society or of any Board or of any Committee or of any officer of the society shall be deemed to be invalid by reason only of the existence of any defect in the procedure or in the constitution of the society or of the Board or of the Committee thereof or in the appointment or election of an officer or on the ground that such officer was disqualified to hold office.

PRIVILEGES OF MULTI-STATE CO-OPERATIVE SOCIETIES

Multi-State co-operative society to be body corporate (Sec. 52). The registration of a multi-State co-operative society shall render it a body corporate by the name under which it is registered having perpetual succession and a common seal. Such a society shall have power to hold property, enter into contracts, institutie and defend suits, and other legal proceedings and to do all things necessary for the purposes for which it is constituted.

Charge and set-off, in respect of share or contribution or interest of members (Sec. 53). A multi-State co-operative society shall have a charge on the share or contribution or interest in the capital or the deposits of a member and on any dividend, bonus or profit payable to him in respect of any debt due from such member to the society. It may set-off any sum credited or payable to the member in or towards payment of any such debt. This provision also applies to a past member or the estate of a deceased member.

Share or contribution or interest not liable to attachment (Sec. 54). The share or contribution or interest of a member or past or deceased member in the capital of a multi-State co-operative society shall not be liable to attachment or sale under any decree or order of any Court in respect of any debt or liability incurred by such member. Further an Official Assignee or a Receiver under any law relating to insolvency shall not be entitled to or have any claim on such share or contribution or interest.

Likewise the reserve fund, or bad debts reserve, or the provident fund of the employees, of the society invested by such society in accordance with the provisions of this Act and the rules shall not be liable to attachment under any decree or order of a Court in respect of any debt or liability incurred by the society.

Register of members (Sec. 55). Any register or list of members or shares kept by any multi-State co-operative society shall be *prima facie* evidence of any of the following particulars entered therein, namely,—

(a) the date on which any person entered in such register list became a member ;

(b) the date on which any such person ceased to be a member.

Admissibility of copy of entry as evidence. A copy of any entry in a book of a multi-State co-operative society regularly kept in the course of its business shall, if certified in prescribed manner, be received in any suit or legal proceedings as *prima facie* evidence of the existence of such entry.

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Exemption from comulsory registration of instruments (Sec. 57). Sec. 17 (1) *(b)* and *(c)* of the Registration Act, 1908 shall not apply to—

(a) any instrument relating to shares in a multi-State co-operative society notwithstanding that the assets of the society consist in whole or in part of immovable property ; or

(b) any debenture issued by any such society and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in immovable property, except in so far as it entitles the holder thereof to the security afforded by a registered instrument whereby the society has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures ; or

(c) an endorsement upon or transfer of any debenture issued by any such society.

Deduction from salary to meet multi-State co-operative society's claim in certain cases (Sec. 58). A member of a multi-State co-operative society may execute an agreement in favour of that society providing that his employer disbursing his salary or wages shall be competent to deduct every month from the salary or wages payable to him, the amount specified in the agreement and to pay the same to the society in satisfaction of any debt or other demand owing by the member of the society.

On the execution of such agreement, the employer disbursing the salary or wages of the members shall, if so required by the multi-State co-operative society by a requisition in writing, make the deduction in accordance with the agreement. Further he shall pay the amount so deducted to the society within the period of 14 days of the date on which deduction has been made. Such payment shall be valid discharge of the employer for his liability to pay the amount deducted.

Government aid to multi-State co-operative societies (Sec. 59). Notwithstanding anything contained in any law for the time being in force, the Central Government or a State Government may, with a view to promoting co-operative movement—

(a) subscribe to the share capital of a multi-State co-operative society ;

(b) give loans or make advances to a multi-State co-operative society ;

(c) guarantee the repayment of principal and payment of interest on debentures issued by a multi-State co-operative society ;

(d) guarantee the repayment of share capital of a multi-State co-operative society and dividends thereon ;

(e) guarantee the repayment of principal and payment of interest on loans and advances to a multi-State co-operative society ;

(f) give financial assistance in any other form, including subsidies, to any multi-State co-operative society.

PROPERTIES AND FUNDS OF MULTI-STATE CO-OPERATIVE SOCIETIES

Funds not to be divided by way of profit (Sec. 60). No part of the funds, other than net profits, of a multi-State co-operative society shall be divided by way of bonus or dividend or otherwise distributed among its members.

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Disposal of net profits (Sec. 61). A multi-State co-operative society shall out of its net profits in any year—

(a) transfer an amount, not less than 25 per cent, to the reserve fund ; and

(b) credit such portion, as may be prescribed, to the co-operative eduction fund maintained by the National Co-operative Union of India Limited.

The balance of the net profots may be utilised for all or any of the following purposes, namely :

(a) payment of dividend to members on their paid-up share capital at a rate not exceeding the prescribed limit ;

(b) constitution of, or contribution to, such special funds including education funds, as may be specified in the bye-laws ;

(c) donation of amounts not exceeding 5 per cent of the net profits for any purpose connected with the development of co-operative movement or charitable purpose as defined in Sec. 2 of the Cahritable Endowments Act, 1890 ;

(d) payment of *ex gratia* amount to employees of the multi-State co-operative society to the extent and in the manner specified in the bye-laws.

The funds of a multi-State co-operative society shall not be utilised for any political purpose.

Investment of funds (Sec. 62). A multi-State co-operative society may invest or deposit its funds—

(a) in a co-operative bank, State co-operative bank, co-operative land mortgage bank, co-operative land development bank or Central co-operative bank ; or

(b) in any of the securities specified in Sec. 20 of the Indian Trusts Act. 1882 ; or

(c) in the shares or securities of any other multi-State co-operative society ; or

(d) in the shares, securities or assets of any other institutions, with the previous approval of the Central Registrar ; or

(e) with any bank ; or

(f) in such other mode as may be prescribed.

In Clause *(e)*, "bank" means any banking company as defined in Sec. 5 *(e)* of the Banking Regulation Act, 1949, and includes, —

(i) the State Bank of India constituted under the State Bank of India Act, 1955 ;

(ii) a subsidiary bank as defined in Sec. 9 *(k)* of the State Bank of India (Subsidiary Banks) Act, 1959 ;

(iii) a corresponding new bank constituted under Sec. 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or a corresponding new bank constituted under Sec. 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980.

Restictions on loans (Sec. 63). A multi-State co-operative society, other than a co-operative bank, shall not make a loan—

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(a) to a member on the security of his share or on the security of a non-member ; or

(b) to a non-member.

However with the general or special sanction of the Central Registrar, a multi-State co-operative society may make loans to another multi-State co-operative society.

It may also make a loan to a depositor on security of his deposit.

Restrictions on borrowing (Sec. 64). A multi-State co-operative society shall receive deposits and loans only to such extent and under such conditions as may be specified in the bye-laws. A co-operative bank shall however be governed by the provisions of the Banking Regulation Act, 1949.

Restrictions on other transactions with non-members (Sec. 65). Save as provided in Secs. 63 and 64, the transactions of a multi-State co-operative society with any person other than a member shall be subject to such prohibitions and restrictions, if any, as may be prescribed.

AUDIT, INQUIRY, INSPECTION AND SURCHARGE

Audit (Sec. 67). *Audit once in each year.* The Central Registrar shall audit, or cause to be audited by a person authorised by him by general or special order in writing in this behalf, the accounts of every multi-State co-operative society at least once in each year. The audit shall include an examination of overdue debts, if any, the verification of the cash balance and securities and a valuation of the assets and liabilities of the multi-State co-operative society.

Auditor to have free access. The person auditing the accounts of a multi-State co-operative society shall have free access to the books, accounts, papers, vouchers, stock, and other property of such society and shall be allowed to verify its cash balance and securities.

Directors, managers etc. to help. The directors, managers, administrators and other officers of the multi-State co-operative society shall furnish to the person auditing the accounts of the society all such information as to its transactions and working as such person may require.

Powers. The Central Registrar or the person authorised by him to audit the accounts of a multi-State co-operative society shall have power, where necessary—

(a) to summon at the time of the audit any officer, agent, servant or member of the society, past or present, who can give valuable information in regard to transactions of the society or the management of its affairs ; and

(b) to require the production of any book or document relating to the affairs of, or any cash or securities belonging to, the society by any officer, agent, servant, or member of the society in possession of such books, documents, cash or securities and in the event of serious irregularities discovered during audit, to take them into custody.

Accounts incomplete at the time of audit. If at the time of audit the accounts of a multi-State co-operative society are not complete, the Central Registrar or the person authorised by him to audit may cause the accounts to be written up at the expense of the society.

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Audit fee. Audit fee, if due from any multi-State co-operative society shall be determined by the Central Registrar and shall be recoverable in the manner as is provided in Sec. 89.

Books of account (Rule 16 of the Audit Rules). Every society shall keep books of account with respect to the following :

(a) all sums of money received and expended and the matters in respect of which the receipt and expenditure take place ;

(b) all sales and purchases of goods ;

(c) the assets and liabilities ;

(d) in the case of a multi-State co-operative society engaged in production, processing and manufactuting particulars relating to utilisation of materials or labour or other items of costs as may be specified by the Central Registrar.

Subject-matter of audit (Rule 17 of the Audit Rules). (1) The audit shall include in addition to the matters specified above, the following particulars :

(a) Whether the auditor has obtained all the information and explanations which, to the best of his knowledge and belief, are necessary for the purposes of his audit ;

(b) Whether in his opinion proper books of account as specified in these rules and bye-laws have been kept by the multi-State co-operative society so far as it appears from the examination of those books and proper returns adequate for the purposes of his audit have been received from the branches not visited by him ;

(c) Whether the balance-sheet and profit and loss account exhibit a true and fair view of the state of affairs of the multi-state co-operative society according to best of his information and explanations given to him and as shown by the books of the multi-state co-operative society ; and

(d) Whether there has been any material impropriety or irregularity in the expenditure or in relation money due to the multi-State co-operative society.

(2) Where in any of the matters referred to above the answer is in the negative or in the affirmative with any remarks, the auditor shall give reasons for such answer with facts and figures in support of such remarks.

(3) The audit report shall also contain schedules with particulars of —

(a) All transactions which appear to be contrary to the provisions of the Act, the rules or the bye-laws of the multi-state co-operative society ;

(b) Any money belonging to the multi-State co-operative society which appears to the auditor to be bad or doubtful of recovery ;

(c) The loans given by the multi-State co-operative society to the members of the Board ; and

(d) Any other matter as may be specified by the Central Registrar in this regard.

Inspection of multi-State co-operative societies (Sec. 68)

The Central Registrar, or any person authorised by him, by general or special order in writing, may inspect a multi-State co-operative society

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Access to books, etc. For the purpose of inspection, the Central Registrar or the person authorised by him shall at all times have access to all books, accounts, papers, vouchers, securities, stock and other property of that society. He may, in the event of serious irregularities discovered during inspection, take books, etc into custody and shall have power to verify the cash balance of the society. He shall call meeting of the Board and also a general meeting of the society where such meeting is, in his opinion, necessary.

Furnishing of information. Every officer or member of a multi-State co-operative society shall furnish such information with regard to the working of the society as the Central Registrar or the person making such inspection may require.

Communication of report. A copy of the report of inspection shall be communicated to the multi-State co-operative society within a period of 3 months from the date of completion of such inspection.

Inquiry by Central Registrar (Sec. 69)

The Central Registrar may, of his own motion or on the application of a majority of the members of the Board or of not less than 1/3rd of the members, hold an inquiry into the constitution, working and financial condition of a multi-State co-operative society.

Powers of the Central Registrar. The Central Registrar or the person authorised by him to hold the inquiry shall have the powers, namely,—

(a) he shall at all reasonable times have free access to the books, accounts, documents, securities, cash and other properties belonging to or in the custody of the multi-State co-operative society ;

(b) he may summon any person in possession or responsible for the custody of any such books, accounts, documents, securities, cash or other properties to produce the same, at any place specified by him ;

(c) he may require the officers of the society to call a general meeting of the society by giving notice of not less than 7 days at such time and place at the headquarters of the society to consider such matters, as may be directed by him. Where the society refuses or fails to call such a meeting he shall have power to call it himself. The meeting so called shall have all the powers of general meeting of the society called under the bye-laws of the society and its proceeding shall be regulated by such bye-laws ;

(d) he may summon any person who is reasonably believed by him to have knowledge of the affairs of the multi-State co-operative society to appear before him at any place at the headquarters of the society or any branch thereof and may examine such person on oath.

Communication of summary of report. The Central Registrar shall, within a period of 3 months of the date of receipt of the report, communicate a brief summary of the inquiry to the multi-State co-operative society, the financial institutions, if any, to which the society is affiliated, and to the persons or authority, if any, at whose instance the inquiry is made.

Costs of inquiry and inspection (Sec. 71). Where an inquiry is held under Sec. 69 or an inspection is made under Sec. 70, the Central Registrar may apportion the costs between the multi-State co-operative society, the members or creditor demanding an inquiry or inspection and the officers or

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former officers and members or past members of the society. However, no order of apportionment of the costs shall be made unless the society or the person liable to pay the costs has had a reasonable opportunity of being heard. The Central Registrar shall state in writing under his own hand the grounds on which the costs are apportioned.

Recovery of costs (Sec. 72). Any sum awarded by way of costs under Sec. 71 may be recovered, on application to a Magistrate having jurisdiction in the place where the person, from whom the money is claimable, actually and voluntarily resides or carries on business, and such Magistrate shall recover the same as if it were a fine imposed by himself.

SETTLEMENT OF DISPUTES

Disputes (Sec. 74)

If any dispute [other than a dispute regarding disciplinary action taken by a multi-State co-operative society against its paid employee or an industrial dispute as defined in Sec. 2 *(k)* of the Industrial Disputes Act, 1947] touching the constitution, management or business of a multi-State co-operative society arises, such dispute shall be referred to the Central Registrar for decision. No Court shall have jurisidiction to entertain any suit or other proceedings in respect of such dispute.

Parties to disputes. Disputes may arise—

(a) among members, past members and persons claiming through members, past members and deceased members, or

(b) between a member, past member or a person claiming through a member, past member or deceased member and the multi-State co-operative society, its Board or any officer, agent or employee of the multi-State co-operative society or liquidator, past or present, or

(c) between the multi-State co-operative society or its Board and any past Board, any officer, agent or employee, or any past officer, past agent or past employee or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the multi-State co-operative society, or

(d) between the multi-State co-operative society and any other multi-State co-operative society, between a multi-State co-operative society and liquidator of one multi-State co-operative society or between liquidator of another multi-State co-operative society.

Nature of disputes. The following shall be deemed to be disputes touching the constitution, management, or business of a multi-State co-operative society, namely :

(a) a claim by the multi-State co-operative society for any debt or demand due to it from a member or the nominee, heirs or legal representatives of a deceased member whether such debt or demand be admitted or not ;

(b) a claim by a surety against the principal debtor where the multi-State co-operative society has recovered from the surety any amount in respect of any debt or demand due to it from the principal debtor as a result of the default of the principal debtor, whether such debt or demand is admitted or not ;

(c) any dispute arising in connection with the election of any officer of a multi-State co-operative society.

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Decision of Central Registrar final. If any question arises whether a dispute referred to the Central Registrar is or is not a dispute touching the constitution, management or business of a multi-State co-operative society, the decision of the Central Registrar shall be final and shall not be called in question in any Court.

Settlement of disputes (Sec. 76)

The Central Registrar may, on receipt of the reference of dispute under Sec. 74,—

(a) elect to decide the dispute himself ; or

(b) transfer it for disposal to any other person who has been invested by the Central Government with powers in that behalf.

Withdrawal of reference. The Central Registrar may withdraw any reference transferred under Clause *(b)* and decide it himself or refer the same for decision to any other person who has been invested by the Central Government with powers in that behalf.

Interlocutory orders. The Central Registrar or any other person to whom a dispute is referred for decision may, pending the decision of the dispute, make such interlocutory orders as he may deem necessary in the interest of justice.

WINDING UP

Winding up of multi-State co-operative societies (Sec. 77)

Circumstances for winding up. The Central Registrar, after an inquiry (under Sec. 69) or an inspection (under Sec. 70) or on receipt of an application made by not less than 3/4ths of the members of a multi-State co-operative society, may be of opinion that the society ought to be wound up. In such a case he may, after giving the society a reasonable opportunity of making its representations, by order, direct it to be wound up.

The Central Registrar may, of his own motion and after giving the multi-State co-operative society a reasonable opportunity of making its representations, make an order directing the winding up of the multi-State cop-operative society—

(a) where it is a condition of the registration of the society that the society shall consist of at least 50 members and the number of members has been reduced to less than 50 ; or

(b) where the multi-State co-operative society has not commenced working within a period of 6 months of the date of its registration or such extended period as the Central Registrar may allow in this behalf or has ceased to function in accordance with co-operative principles.

Cancellation of order for winding up. The Central Registrar may cancel an order for the winding up of the multi-State co-operative society, at any time, in any case where, in his opinion, the society should continue to exist.

Communication of order for winding up. A copy of the order for winding up shall be communicated by registrated post to the multi-State co-operative society and to the financial institutions, if any, of which the society is a member.

Winding up of co-operative bank. A co-operative bank can be wound up only with the previous sanction in writing of the Reserve Bank.

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Liquidator (Sec. 80)

Appointment. Where the Central Registrar has made an order under Sec. 77 for the winding up of a multi-State co-operative society, the Central Registrar may appoint a liquidator for the purpose and fix his remuneration. The liquidator shall, on appointment, take into his custody or under his control all the property, effects and actionable claims to which the multi-State co-operative society is or appears to be entitled. He shall also take such steps as he may deem necessary or expedient to prevent loss or deterioration of, or damage to such property, effects and claims and carry on the business of the multi-State co-operative society so far as may be necessary with the previous approval of the Central Registrar.

Where an order for the winding up of a multi-State co-operative society is set aside in appeal, the property, effects and actionable claims of the society shall re-vest in the society.

Powers of liquidator (Sec. 81). The whole of the assets of a multi-State co-operative society in respect of which an order of winding up has been made, shall vest in the liquidator from the date on which the order takes effect. The liquidator shall have power to realise such assets by sale or otherwise. He shall also have power, subject to the control of the Central Registrar,—

(a) to institute and defend suits and other legal proceedings on behalf of the multi-State co-operative society by the name of his office ;

(b) to determine from time to time the contribution (including debts due and costs of liquidation) to be made or remaining to made by the members or past members or by the estates or nominees, heirs or legal representatives of deceased members or by any officers or former officers, to the assets of the multi-State co-operative society ;

(c) to investigate all claims against multi-State co-operative society and subject to the provisions of this Act, to decide questions of priority arising between claimants ;

(d) to pay claims against the multi-State co-operative society, including interest up to the date of winding up according to their respective priorities, if any, in full or rateably, as the assets of the society may permit. The surplus, if any, remaining after payment of the claims is applied in payment of interest from the date of such order of winding up at a rate fixed by Central Registrar but not exceeding the contract rate in any case ;

(e) to determine by what persons and in what proportions the costs of the liquidation are to be borne ;

(f) to determine whether any person is a member, past member or nominee of a deceased member ;

(g) to give such directions in regard to collection and distribution of the assets of the multi-State co-operative society as may appear to him to be necessary for winding up the affairs of that society ;

(h) to carry on the business of the multi-State co-operative society so far as may be necessary for the beneficial winding up of the same ;

(i) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging to have any claim, present or future, whereby the multi-State co-operative society may be rendered liable ;

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(j) to make any compromise or arrangement with any person between whom and the multi-State co-operative society there exists any dispute and to refer any such dispute for decision ;

(k) after consulting the members of the multi-State co-operative society to dispose of surplus, if any, remaining after paying the claims against the society, in such manner as may be prescribed ;

(l) to compromise all calls or liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, subsisting or alleged to be subsisting between the multi-State co-operative society and a contributory or other debtor or person apprehending liability to the multi-State co-operative society and all questions in any way relating to or affecting the assets or the winding up of the society on such terms as may be agreed and take any security for the discharge of any such call, liability, debt or claim and give a complete discharge in respect thereof.

When the affairs of a multi-State co-operative society have been wound up, the liquidator shall make a report to the Central Registrar and deposit the records of the society in such place as the Central Registrar may direct.

Disposal of surplus assets (Sec. 82)

The surplus assets, as shown in the report of a liquidator of a multi-State co-operative society which is wound up,—

(a) may, if the bye-laws of the multi-State co-operative society specify the purpose for which surplus shall be utilised, be utilised by the Central Registrar for the said purpose, and

(b) if the bye-laws aforesaid do not specify the purpose, be divided by the Central Registrar, with the previous sanction of the Central Government, amongst the members of such multi-State co-operative society in such manner as may be prescribed.

Power of Central Registrar to cancel registration of a multi-State co-operative society (Sec. 83)

The Central Registrar may, after considering the report of the liquidator made to him under Sec. 81, order the registration of the multi-State co-operative society to be cancelled. On such cancellation, the society shall stand dissolved. The order shall be communicated by registered post to the president of the multi-State co-operative society and to the financial institutions, if any, of which the society was a member.

MISCELLANEOUS

Offences (Sec. 96)

A multi-State co-operative society or an officer or member thereof wilfully making a false return or furnishing false information, or any person wilfully or without any reasonable excuse disobeying any summons, requisition or lawful written order issued under the provisions of this Act, or wilfully not furnishing any information required from him by a person authorised in this behalf under the provisions of this Act, shall be punishable with fine which may extend to Rs. 200.

Any officer or custodian who wilfully fails to hand over custody of books, accounts, documents, records, cash, security and other property

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belonging to a multi-State co-operative society of which he is an officer or custodian, to a person entitled under Sec. 49, Sec. 67, Sec. 68, Sec. 69, or Sec. 80 shall be punishable with fine which may extend to Rs. 200. In the case of a continuing breach, such officer or custodian shall be punishable with a further fine which may extend to Rs. 500 for every day during which the breach is continued after conviction for the first such breach.

Cognizance of offences (Sec. 97). No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence under this Act.

No prosecution shall be instituted under this Act without the previous sanction of the Central Registrar and such sanction shall not be given without giving to the person concerned a reasonable opportunity to represent his case.

Copy of Act, rules and bye-laws, etc, to be open to inspection (Sec. 98)

Every multi-State co-operative society shall keep a copy of this Act, the rules and its bye-laws and also a list of its members, open to inspection free of charge at all reasonable times at the registered address of the society.

Certain Acts not to apply (Sec. 102)

The provisions of the Companies Act, 1956 and the Monopolies and Restrictive Trade Practices Act, 1969 shall not apply to multi-State co-operative societies.

The multi-State co-operative societies registered under the provisions of this Act shall not indulge in monopolistic and restrictive trade practices, as defined in the Monopolies and Restrictive Trade Practices Act, 1969.

Bar of jurisdiction of Courts (Sec. 105)

Save as otherwise provided in this Act, no Court shall have jurisdiction in respect of—

(a) the registration of a multi-State co-operative society or its bye-laws or of an amendment of the bye-laws ;

(b) the disputes required under Sec. 74 to be referred to the Central Registrar ;

(c) any disputes required under Sec. 74 to be referred to the Central Registrar ; and

(d) any matter concerning the winding up and the dissolution of a multi-State co-operative society.

While a multi-State co-operative society is being wound up, no suit or other legal proceedings relating to the business of such society shall be proceeded with or instituted against the liquidator or against the society or any member thereof, except by leave of the Central Registrar and subject to such terms and conditions as he may impose.

Save as otherwise provided in this Act, no decision or order made under this Act shall be questioned in any Court.

Power to make rules (Sec. 109)

The Central Governemnt may, by notification, make rules to carry out the provisions of this Act.

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Every rule made under this Section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total peirod of 30 days which may be comprised in 1 session, or in 2 or more successive sessions. If both Houses agree in making any modification to the rule, the rule shall have effect only in such modified form. If both Houses agree that the rule should not be made, the rule shall thereafter be of no effect. However, any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

TEST QUESTIONS

1. What are the objects of the Co-operative Societies Act, 1912 ?
2. Define the following terms as used in the Co-operative Societies Act, 1912 :

   Bye-laws, committee, member, registered society.
3. What are the rights and liabilities of the members of a co-operative society registered under the Co-operative Societies Act, 1912 ?
4. What are the conditions for the registration of a co-operative society under the Co-operative Societies act, 1912 ? What is the procedure for the registration of such a society ?
5. What are the rights and liabilities of the members of a co-operative society registered under the Co-operative Societies Act, 1912 ?
6. What are the duties of a registered co-operative society ?
7. A society registered under the Co-operative Societies Act, 1912 enjoys certain privileges. What are these ?
8. What was the object of passing the Multi-State Co-operative Societies Act, 1984 ?
9. Enumerate the co-operative principles as enunciated in the First Schedule to the Multi-State Co-operative Societies Act, 1984.
10. What are the co-operative societies which may be registered under the Multi-State Co-operative Societies Act, 1984 ? Who can become members of such societies ?
11. What is the role of the Central Registrar in the administration of the Multi-State Co-operative Societies Act, 1984 ?
12. Explain the procedure for registration of a multi-State Co-operative society.
13. What are bye-laws ? How can bye-laws of a multi-State co-operative society be amended ?
14. Write a note on general body of a multi-State Co-operative society, its constitution, powers and functions.
15. What are the provisions of the Multi-State Co-operative Societies Act, 1984 as regards the annual general meeting of a multi-State co-operative society ?
16. Write a note on the constitution of the Board of Directors of a multi-State co-operative society. What are the disqualifications for a member of the Board ?
17. What are the powers and functions of the Board of Directors of a multi-State co-operative society ?
18. State the privileges of a multi-State co-operative society.
19. How can the funds of a multi-State co-operative society be invested ? Are there any restrictions on loans made by it and moneys borrowed by it ?
20. Write a note on audit and inspection of accounts of a multi-State co-operative society.
21. How are disputes of a multi-State co-operative society setted ?
22. Under what circumstances may a multi-State co-operative society be wound up ?

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14

The Transfer of Property Act, 1882

SECTION 1—GENERAL PRINCIPLES

The law relating to transfer of property in India is contained in the Transfer of Property Act, 1882. Prior to enactment of this Act, the transfer of immovable property was governed by a few Regulations and the principles of 'justice, equity and good conscience' as these prevailed in England. These were however found to be inadequate as regards their application to peculiar social conditions prevailing in our country. The Transfer of Property Act, 1882 was passed to meet these peculiar conditions. The Act defines and amends certain parts of the law relating to transfer of property by act of parties.

Objects of the Act

The chief objects of the Act are—

1. to lay down uniform rules for transfer of property ; and

2. to complete the code of contract law so far as it relates to immovable property.

The Act is not, and does not purport to be, an exhaustive code. Its general provisions do not affect the special provisions of the Indian Contract Act, 1872.

The Act came into force on July 1, 1882 (Sec. 1, Para 2)

Reference to Sections

Unless otherwise indicated, reference to sections in this Chapter is to the Transfer of Property Act, 1882.

WHAT IS TRANSFER

The term 'transfer' means a *process* or an act by which some property is *handed over* to another. Para 1 of Sec. 5 defines 'transfer of property' as follows :

> "Transfer of property means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons ; and 'to transfer property' is to perform such act."

The essential elements of 'transfer of property' as emerge from the above definition may be discussed under the following heads :

1. **Transfer**. The essence of the term 'transfer' is 'to convey'. It, therefore, implies conveyance of property by a person entitled to it to a person having no title to it. In *Murli Prasad* v. *Paras Nath*, A.I.R. (1967) Pat.191, it was observed that the word 'transfer' is of wide amplitude and extends to all

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transactions in which a person is divested of some property and that property is subsequently vested in another person.

The transfer of property includes not only the *five* specific categories of transfer dealt with in the Act, namely, sale, mortgage lease, gift and exchange, but also any other transaction which has the effect of 'conveying' any property from one person to another.

The Transfer of Property Act applies only if a transfer is the result of the act of the parties (as for example, when *A* sells or gifts his house to *B*). It does not include transfer by operation of law (as for example, when *A*'s property is sold in execution of a decree or in case of his insolvency). But some provisions of the Act are applied to transfers by operation of law on principles of 'justice, equity and good conscience'.

2. **Living persons.** A transfer usually involves *two* distinct living persons. The person transferring property is called the *transferor* and the person to whom the property is transferred is called *the transferee*. Sec. 5 also contemplates that a person can transfer property to a trust in which he constitutes himself as a trustee.

The term 'living person' includes a company or association or body of individuals, whether incorporated or not (Para 2 of Sec. 5). A company is a juristic person. For certain purposes law treats it as standing on the same footing as living persons. It is capable of owning, transferring and assigning property. An idol is also by fiction of law regarded as a juristic person, clothed with rights of persons and as such capable of holding property. But it is not a living person. A dedication of a property to an idol is not a transfer, it is a gift : the gift is valid but it is not a gift to a living person [*Narasimhaswami* v. *Venkatalingam*, A.I.R.(1927) Mad. 637].

A Court is not a juristic person. It cannot be sued. It is not capable of taking and assigning property.

Further both the transferor and the trnasferee effecting a transfer must be *living persons*, that is a transfer *inter vivos* (i.e.,between living persons) alone is contemplated by the Act. A transfer *inter vivos* must be distinguished from a transfer by means of a will. A transfer by means of will is not a transfer according to the Act. It takes effect only after the death of the testator (one who leaves a will) and as such it is not a transfer between two living persons.

3. **Conveyance.** 'Transfer of property' means an act by which a living person conveys property. The word 'conveys' is used in a very wide sense. The following acts do not constitute a transfer of property within the meaning of Sec. 5.

(a) Family arrangements. A 'family arrangement' is an arrangement between the members of a family. It may be for compromising and adjusting conflicting *bona fide* claims of the members of the family, or for preserving the property of the family or for peace and security of the family by avoiding litigation. A family arrangement does not amount to a transfer of property. It is a recognition of pre-existing rights and does not convey any new or distinct title to any member or members.

(b) Settlement of a disputed claim. It refers to the recognition of title of the party claiming it and abandonment of all further claims to it. Like family arrangement, it also does not convey any new or distinct title to the parties to the settlement [*Inderpaul Singh* v. *Sarnam Singh*, A.I.R. (1951) All. 823].

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(c) Release, relinquishment and surrender. 'Release' means giving up or renunciation of rights or claims against another. It also means admission by the party executing release deed that he has no interest in the property released. It pre-supposes the existence of title in a third party. It can, therefore, only feed the title ; it cannot reconvey it [*Hutchi Gowder* v. *Bheema Gowder*, A.I.R. (1960) Mad. 33].

'*Relinquishment*' means extinction of rights or interest in property and when this happens there is nothing left to transfer. As such it does not amount to a transfer of property [*Provident Investment Co.* v. *Commissioner of Income-tax*, A.I.R. (1954) Bom. 95].

'*Surrender*' is also an act of extinction or a right of self-effacement on the part of the person surrendering property. It results in merger of a lesser estate with a greater estate and as such it does not give rise to a transfer (*Makhanlal* v. *Nagendranath*, 60 Cal. 379).

(d) Partition. In partition there is only a change in the mode of enjoyment, its essence being conversion of joint enjoyment of family property into enjoyment in several. In partition one co-owner gets one or more specific items of property instead of excercising a right in all the joint properties [*V.N. Sarin* v. *Major Ajit Kumar Popli*, (1966) 1 S.C.R. 349].

4. **Property**. The term property is not defined in the Act. Sec. 9 of the Act however says that 'property of any kind' may be transferred. This means the term property is used in the Act in a very wide sense and is left open for judicial interpretation. In *Jones* v. *Skinner*, (1835) 5 L.J.Ch. 90, Lord Langdale observed that the term 'property' is the most comprehensive of all terms which can be used as indicative and descriptive of every possible interest that a party can have. The term 'property' is used not only in the objective sense of the concrete things which are capable of physical possession and subject of ownership but it is also used in the sense of the rights and interests of the owner or the partial owner of that property.

The term 'property' has been held to include :

(a) A copyright in a literacy composition.

(b) An actionable claim.

(c) An annuity.

(d) A right to collect lac from trees.

(e) A mortgagors' right to redeem the mortage.

5. **In present or in future**. 'Transfer of property' may take place in present or in future, but the property must be in existence. The words 'in present or in future' in Sec. 5 refer to 'conveys' and not 'property'. Sec. 5 does not authorise transfer of future property for a person cannot transfer what is not in existence. If he agrees to transfer future property, the transaction operates as a *contract to transfer* such property. The transferee can sue for specific performance of the contract when the property comes into existence, provided the future property is not of the kind whose transfer is prohibited by Sec. 6.

IMMOVABLE AND MOVABLE PROPERTY

Immovable property

The Act does not define 'immovable property'. Sec. 3 only states that 'immovable property' does not include standing timber, growing crops or grass.

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According to Sec. 3 (26) of the General Clauses Act, 1897 'immovable property' includes "land, benefits to arise out of land, things attached to the earth, or permanently fastened to anything attached to the earth".

This definition does not tell us as to what 'immovable property' is. It tells us only what is included and what is not included in 'immovable property' Standing timber, growing crops and grass are not included in the definition because they are severable from the land on which they stand. But if the land to which they are attached is sold, these things also pass to the buyer under Sec. 8 as things attached to the earth, being the legal incidents of the land sold.

According to Sec. 3, things 'attached to the earth' mean things :

(a) rooted in the earth, as in the case of trees and shrubs ;

(b) imbedded in the earth, as in the case of walls or buildings ; or

(c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached.

'Immovable property' includes not only physical objects like land and buildings, but also every benefit arising out of it and every interest in it.

Movable property

The Act does not define 'movable property' but it may be said that any property which is not 'immovable property' is 'movable property'.

Sec.2 (9) of the Registration Act, 1908 defines 'movable property' as including standing timber, growing crops and grass, fruit upon and juice in trees and property of every description, *except* immovable property.

Difference between immovable and movable property. In an old Madras case, *Sukry Kurdepa* v. *Goondakul*, (1872)6 Mad. H.C. 71, the distinction between 'movable' and immovable has been explained thus :

> "Movability may be defined to be a capacity in a thing of suffering alteration of the relation of place. Immovability is incapacity for such alteration. If, however, a thing cannot change its place without injury to the quality by virtue of which it is, what it is, it is immovable. Certain things such as a piece of land are in all circumstances immovable. Others, such as trees attached to the ground, are, so long as they are attached, immovable. When the severence has been effected, they become movable."

ESSENTIALS OF A VALID TRANSFER

In order to constitute a valid transfer of property, whether movable or immovable, the following conditions must be satisfied :

1. The property must be transferable.
2. The transferor must be competent to transfer.
3. The transferee must be competent to take the transfer.
4. The consideration and the object of the transfer must be lawful.
5. The transfer must not be opposed to the nature of interest affected thereby.
6. The transfer must be made in the manner and form prescribed by the Act, if any.

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These essentials of a valid transfer are discussed below :

1. Property must be transferable (Sec. 6)

The general rule is that every kind of property can be transferred. Sec. 6 enumerates nine kinds of property which cannot be transferred . These nine kinds form an exception to the general rule.

If a person alleges non-transferability of a particular property, the onus of proof is on the person who alleges or asserts it. He must strictly prove the existence of some rule of law which restricts the right of transfer.

Exceptions [Sec.6, Clauses *(a) to (i)*]. The rule that property of any kind may be transferred is subject to the following exceptions:

(1) *Chance of an heir apparent or spes successionis.* The technical expression for the chance of an heir apparent succeeding to an estate is called *spes successionis*. It means a mere chance or hope of succeeding to a property.

Spes Successionis includes:

(a) Chance of an heir apparent succeeding to an estate. This means an interest which has not arisen but which may arise in future. It is in anticipation or hope of succeeding to the estate of a deceased person. Such a chance is not property and as such cannot be transferred. If it is transferred, the transfer is wholly void.

Example. S is the son of *F* who is the owner of a building. So long as *F* is alive, *S* has only a hope of inheriting this property. *S* cannot transfer this properly merely on the basis of the hope that he would get it after the death of his father.

(b) Chance of a relation obtaining a legacy on the death of a kinsman. This is also a mere possibility and cannot be transferred.

(c) Any other mere possibility of a like nature. The expression 'any other possibility of a like nature' must be construed as a possibility belonging to the same category as a chance of an heir apparent or the chance of a relation obtaining a legacy. Some of the instances of mere possibilities of a like nature include—the chance of receiving a gratuitious payment at the discretion of an employer, the chance of obtaining rent in respect of a future possible lease that may come into existence as a result of renewal, the chance of a person deriving income in future from a contract which he hopes to get. As held by the Calcutta High Court the right to receive future offerings at a temple is *spes successionis* (*Nityagopal* v. *Nani Lal*, 47 Cal. 990). The Allahabad High Court has however held that "the fact that offerings, large or small, are bound to be made is a certainty, and not a mere possibility" and such a right can be transferred (*Nand Kumar* v. *Ganesh Dass*, 58 All. 457).

(2) *Right of re-entry.* This is a right which a lessor has against the lessee for breach of an express condition of the lease which provides that on its breach the lessor may re-enter. The transferor reserves this right to himself after having parted with the possession of the whole estate. This right is for his personal benefit and cannot, therefore, be transferred.

Example. A leases his property to *B* on condition that if *B* sub-lets the leased property, the lease shall come to an end. If the lease comes to an end, *A* shall have the right of re-entry. *A* cannot transfer this right of re-entry on the leased property when there is a breach to any one except *B*.

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(3) *Transfer of easement.* 'Easement' means an interest in land owned by another that entitles its holder to a specific limited use or enjoyment. Sec. 4 of the Easements Act, 1882 defines an'easement' as a right which the owner or occupier of a certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and to continue to prevent something being done, in or upon or in respect of certain other land not his own.

As easement necesarily involves the existence of a *dominant heritage* and a *servient heritage, e.g.*, right of way over the adjoining property ; it is a right which the owner or occupier of certain immovable property (dominant heritage) possesses over another property (servient heritage) for the proper enjoyment of the property. This right cannot subsist apart from the dominant heritage and therefore the right of easement alone cannot be transferred.

(4) *Interest restricted in its enjoyment.* The cases which fall under this head include the following :

(i) The right of a *pujari* in a temple to receive offerings.

(ii) The right of a widow under Hindu Law to residence and maintenance.

(iii) Religious offices to which emoluments are attached, the office having been given on grounds of personal qualification.

(iv) The office of a *mohunt* of a *mutt.*

The rights given in these cases are purely of a personal nature and cannot therefore be transferred. These rights are restricted to the persons to whom they belong.

(5) *Right to future maintenance.* A right to future maintenance in whatsoever manner arising, secured or determined, cannot be transferred. It is solely for the personal benefit of the person to whom it is granted. The arrears of past maintenance can however be transferred.

(6) *Mere right to sue.* A mere right to sue cannot be transferred. This prohibition is based on the ground of public policy. The object of this prohibition is to prevent trafficking in litigation.

Examples. (a) A commits an assault on *B*. *B* can file a suit against A for the recovery of damages but he cannot assign this right to *C* and allow him to recover damages from *A*.

(b) A enters into a contract with *B*. He does not fulfil his promise. *B* can bring action against *A* for damages , but he cannot transfer this right to *C* to recover damages from *A*.

(7) *Public offices and salaries.* Transfer of public offices and salaries attached to them is prohibited on the ground of public policy. In *Corpn. of Liverpool* v. *Wright*, 28 L.J. Ch. 868, Page Wood, V.C. observed. : "Where the law assigns fees to an office, it is for the purpose of upholding the dignity and performing properly the duties of that office, and the policy of the law will not allow the officer to bargain away those fees to the appointer or any one else."

But as regards salary, a part of it is attachable to discharge a decree under certain circumstances (Sec. 60 of the Civil Procedure Code, 1908).

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(8) *Stipends and pensions.* Stipends allowed to military, naval, air force and civil pensioners of the Government and political pensions cannot be transferred. 'Pension' means a periodical allowance or stipend grantend not in respect of any right, privilege, perquisite, or office but on account of past services or particular merits or as a compensation to pensioners, their families and dependants. Pension is restricted in its enjoyment to the owner personally and any agreement to transfer it is void.

(9) *Occupancy rights.* Transfer of occupancy rights of a tenant is prohibited on the ground of public policy. This restriction is imposed by law for the purpose of regulating relations between landlords and tenants.

2. Transferor must be competent (Sec. 7)

Sec. 7 of the Act deals with persons competent to transfer property. The rule contained in this Section is analogous to the rule contained in Sec. 11 of the Indian Contract Act, 1872 dealing with persons competent to contract. Sec. 7 runs thus :

> "Every person competent to contract and entitled to transferable property, or authorized to dispose of transferable property not his own, is competent to transfer such property either wholly or in part and either absolutely or conditionally, in the circumstances, to the extent and in the manner allowed and prescribed by law for the time being in force".

Simply stated, every person competent to contract and entitled to transferable property or authorised to dispose of property is competent to transfer such property. Sec. 11 of the Indian Contract Act, 1872 runs thus :

> "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by *any law* to which he is subject."

Persons who cannot assign their interest [Sec. 6 *(i)*]. The following persons are prohibited from assigning their interest.

(1) A tenant having an *untransferable* right of occupancy cannot assign his interest as such tenant.

(2) The farmer of an estate in respect of which default has been made in paying revenue cannot assign his interest as such farmer.

(3) The lessee of an estate under the management of a Court of Wards cannot assign his interest as such lessee.

3. Transferee must be competent [Sec. 6 *(h) (3)*]

As a general rule every living person, even a minor, can be a transferee of property.

A minor cannot be a promisor but he can be a promisee or beneficiary in a contract. He cannot be a lessee also if the lease involves a covenant to pay rent to be performed by him, *i.e.*, he cannot be bound by future liabilities attached to a contract [*Shiv* v. *Arun*, A.I.R. (1969) Bom. 93].

But according to sec. 6 *(h)* (3) no transfer of property can be made to a person legally disqualified to be a transferee. According to Sec. 136, Judges, legal practitioners and officers connected with the Court of Justice are disqualified from purhasing any actionable claim. They can however be transferees of any other property.

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4. Consideration and object must be lawful [Sec. 6 *(h)* (2)]

No transfer can be made for an unlawful object or consideration within the meaning of Sec. 23 of the Indian Contract Act, 1872.

Sec. 23 of Indian Contract Act, 1872 provides that the consideration o object of an agreement is lawful, unless—

(a) it is forbidden by law ; or

(b) it is of such a nature that, if permitted, it would defeat the provisions of some law ; or

(c) it is fraudulent ; or

(d) it involves or implies injury to the person or property of another ; or

(e) the Court regards it as immoral, or opposed to public policy.

Every agreement of which the object or consideration is not lawful is void.

Thus if a transfer of property is made for an unlawful consideration or object, the transfer will be void.

5. Transfer must not be opposed to nature of interest [Sec. 6 *(h)* (1)]

Sec. 6 *(h)* (1) lays down that "no transfer can be made in so far as it is opposed to the nature of the interest affected thereby." Thus if a thing by its very nature cannot be transferred, such thing is non-transferable. The following therefore cannot be transferred :

(a) Service inams. The emoluments of the *inams* are attached to the office of the *inamdar.* If its alienation is permitted, the *inamdar* would be left with the burden of service without enjoying the benefit which was provided to enable him to perform the services.

(b) Res communes, i.e., things of which no one in particular is the owner as light, air, water of rivers or the sea.

(c) Res extra commercium, i.e., things thrown out of commerce such as things dedicated to public or religious uses (*Raja Varma* v. *Kettayath*, 7 Mad. H.C. 210).

6. Transfer must be in the prescribed manner (Sec. 9)

The transfer of property must be made in the manner and form prescribed by the Act, if any. According to Sec. 9, a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Under the Act, writing is necessary in the case of the following transfers:

(1) Sale of immovable property of the value of Rs. 100 or more.

(2) Sale of a reversion (the part of a simple estate remaining in its owner after he has granted therefrom a lesser particular estate) or other intangible thing.

(3) Simple mortage irrespective of the amount secured.

(4) All other mortgages for Rs. 100 or more.

(5) Leases of immovable property *(a)* from year to year ; or *(b)* for a term exceeding 1 year ; or *(c)* where yearly rent is reserved.

(6) Exchange.

(7) Gift of immovable property.

(8) Transfer of an actionable claim.

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(9) Notice of transfer of an actionable claim.

In cases (1), (2), (5) and (7) given above, and in case of a mortgage (other than a mortgage by deposit of title deeds) where the principal money secured is Rs. 100 or more, and where a charge is created by act of parties, transfer must be effected by a registered instrument.

Effects of transfer (Sec. 8)

Sec. 8 deals with legal effects of transfer of property. It provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. An 'incident' means something necessarily depending upon, or appertaining to, or passing with, or following another that is called the 'principal', as rent accuring after transfer of land or easments annexed to land. Thus :

Where property transferred is	*Legal incidents of the property which pass to the transferee are*
1. Land	(1) The easements annexed thereto ;
	(2) The rents and profits thereof accuring after the transfer ; and
	(3) All things attached to the earth.
2. Machinery attached to the earth	The movable parts thereof.
3. House	(1) The easements annexed thereto ;
	(2) The rent thereof accuring after the transfer ; and
	(3) The locks, keys, bars, doors, windows and all other things provided for permanent use therewith.
4. Debt or other actionable claim	The securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer.
5. Money or other property yielding income	The interest or income thereof accruing after the transfer takes effect.

The above list is not exhaustive. There are many other incidents which pass on the transfer of a property to which they belong, such as the benefit of a covenant which runs with the land, a right to possession of title deeds, and goodwill on the sale of a business.

Accessory follows the principal. This legal maxim means that when a person acquires some property, he acquires along with it all that appertains to it as accessory. Sec. 8 recognises this maxim.

ILLEGAL RESTRICTIONS ON CERTAIN ALIENATIONS (Secs. 10 to 12, 17 and 18)

1. Condition restraining alienation (Sec. 10)

'Alienation' means conveyance or transfer of property to another. Public policy requires that property should be freely alienable. A right of alienation

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is incidental to, and inseparable from, the beneficial ownership of property. Sec. 10 lays dawn the rule in this regard as follows :

> "Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void."

Restraint on alienation of property may be—

(a) absolute, or

(b) partial.

Absolute restraint or alienation of property is *void*. Partial restraint qualified as to time, place or person may valid and blinding.

Examples of absolute restraint. (a) *A* transfers property to *B* and his heirs with a covenant that if the property is alienated, it should revert to *A*. This restraint is void.

(b) *A* transferred his estate to his son under a condition that if he wanted to sell the property, he should first offer it to *A*'s wife at £3,000 whereas the market value of the property at the time when *A* died was £15,000. *Held*, the condition constituted an absolute restraint on alienation and was void (*Rosher* v. *Rosher*, 26 Ch.D. 801).

(c) There was a partition of family property between a Hindu father and his five sons. The partition deed provided that any son could sell his share, not to any stranger, but only to one of his brothers at the price not exceeding Rs. 1,000 which was much below the real market price. *Held*, the condition constituted an absolute restraint on alienation and was void [*Trichnopoly Varthaga Sangam* v. *Shramagha*, A.I.R .(1939) Mad. 769].

Examples of partial restraint. (a) *A* transters property to *B* on the condition that he should not alienate it in favour of *C* who is *A*'s competitor. This is only a partial restraint and is valid.

(b) *A* sold a house to *B* on the condition that should *B* ever intend to sell it, he would first offer it to *A*. *Held*, the covenant was not void as it was a partial restraint [*Kehn Chand Ram Dass* v. *Mohan Shah*, A.I.R. (1921) Sindh 118].

Exceptions. There are two exceptions to the rule that 'absolute restraints are void'. These are as follows :

(1) *Condition ensuring benefit of lessor.* In case of a lease, the lessor can fetter his lessee's liberty of alienation. Thus if a condition against alienation in a lease is for the benefit of the lessor or those claiming under him, it is not invalid. The reason is that the lessor may have confidence in the lessee but he may not have the same confidence in some other person.

(2) *Condition restricting alienation by a married women.* When property is transferred to or for the benfit of a woman (not being a Hindu, Mohammadan, or Buddhist), a restriction may be imposed that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein. Such a restriction is quite valid.

2. Restraint on enjoyment (Sec. 11)

When a property is transferred absolutely, the transferee should be free to enjoy and dispose of the property in any manner he likes. If the transferor imposes any restraint on the enjoyment or disposal of the property by the transferee, or the restraint is treated as a *clog in the enjoyment* of the property, it is void.

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Examples. (a) *A* sells his house to *B*. He adds a condition that *B* only shall reside in the house. The condition is invalid.

(b) A makes an absolute gift of a house to *B* with a direction that *B* only resides in the house. The direction is void.

(c) A sold a property to *B subject to a condition that B* shall pay to *A* out of the profits of the property a certain sum, by way of rent. *Held*, the condition was void [*Mst. Shiv Kumar* v. *Lachhmi Narain*, A.I.R. (1938) Oudh 17].

Exception. If a person transfers a property to another keeping some other property for himself, he can impose certain conditions which may interfere with the rights of enjoyment of the transferee so that the transferee can enjoy the transferred property in a particular manner only.

Example. A has two adjoining houses *X* and *Y*. He sells house *X* to *B* and directs that *B* shall not construct on house *X* more than one storey so that the house *Y* which *A* retains, gets good light and free air. The direction is valid.

3. Condition making interest determinable on insolvency or attempted alienation (Sec. 12)

If a person transfers property to anyone subject to a condition that if the transferee becomes insolvent, the property should revert back to the transferor, such condition is void.

The rule embodied in Sec. 12 is subject to an exception in the case of a lease. It will not apply to a condition in a lease for the benefit of the lessor or those claiming under him. Thus if a landlord imposes a condition in the lease that if the lessee becomes insolvent, the lease should come to an end, the condition is valid.

4. Direction for accumulation of income (Sec. 17)

Where a person transfers property to another absolutely, but the terms of such transfer direct that the income arising from the property shall be accumulated, the direction is repugnant if it is beyond the period prescribed by Sec. 17.

What is direction for accumulation ? It is a direction regarding income from property for keeping the income separate or postponing its enjoyment. The object of Sec. 17 is to restrict the period for the accumulation of income beyond a certain period as the law frowns upon any attempt to prevent the transferee of the property from enjoying its income indefinitely. Thus, where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly of in part, the direction will be good for—

(a) the life of the transferor, or

(b) a period of 18 years from the date of the transfer, whichever is longer.

If the direction is for a period longer than (a) or (b), the direction is void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods. At the end of the longer of the aforesaid periods, the said property and the income thereof shall be disposed of as if the period during which be accumulation has been directed to be made has elapsed.

Example. A settles the sum of Rs. 5,000 for the benefit of *B* on 1st January, 1979 and directs the trustee to invest the money in units of the Unit Trust of India and to deliver the total accumulated income and the units to *B* on the turn of the

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century. *B* would be entitled to the accumulated income and the units before the stipulated period, *i.e.*, on 1st January, 1997, *i.e.*, 18 years after 1st January, 1979. The accumulation of income is valid upto 31st December, 1996 and void beyond that period.

Object of Sec. 17. Sec. 17 is meant to prevent hardship that may be caused to the heirs of the transferee, or the transferee himself, of the property by postponing the enjoyment of property. Another object of Sec. 17 is to protect the transferee and his heirs from the mischief of provisions like the one made in *Thelluson* v. *Woodford* (1805) 11 Ves. June 112. In this case, Thelluson transferred some property and directed for the accumulation of income for 9 lives in succession. The direction was held to be bad. This case is the foundation of English law on the subject.

Exceptions. Sec. 17 does not affect any direction for accumulation for the purpose of—

(1) the payment of the debts of the transferor or any other person taking any interest under the transfer ; or

(2) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer ; or

(3) the preservation or maintenance of the property transferred ; or

(4) advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind. This would be the case when transfer of property takes place for the benefit of the public in the advancement of these objects.

TRANSFER FOR BENEFIT OF UNBORN PERSON AND PUBLIC

One of the essential elements of a valid transfer of property is that the transferee must be a living person. There cannot, therefore, be a transfer in a favour of an unborn person. Such a transfer can only be made through the medium of a trust. The transfer is also subject to certain restrictions as laid down in Secs. 13 and 14.

Transfer for benefit of unborn persons (Sec. 13)

Sec. 13 deals with 'transfer of property for the benefit of unborn persons'. It provides as follows:

> "Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property."

Example. A transfers property of which he is the owner to *B* in trust for *A* and his intended wife successively for their lives, and after the death of the survivor, for the eldest son of the intended marriage for life, and after his death for *A*'s second son. The interest so created for the benefit of the eldest son does not take effect, because it does not extend to the whole of *A*'s remaining interest in the property.

Sec. 13 may be analysed as follows :

(1) No transfer can be directly made to an unborn person.

(2) The interest in favour of the unborn person must be preceded by a prior interest. It is not permissible to confer only a life estate on such person.

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(3) The prior interest must be also created by the same transfer.

(4) The unborn person must be given the whole of the remaining interest of the transferor in the property.

The sum and substance of Sec. 13 is that property can be transferred to an unborn person provided the transfer is supported by a prior life estate and the unborn person is given an absolute estate.

The rule underlying Sec. 13 has been adopted from the English case of *Whitby* v. *Mitchell*, 44 Ch.D.85. This rule known as the "*rule against double possibilities*" has however been abolished in England but it continues to be followed in India. The principle underlying the rule is that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. The rule is quite distinct from the rule against perpetuities, though their effects sometimes overlap.

Rule against perpetuity (Sec. 14)

Webster Dictionary defines 'perpetuity' as "the quality or state of being perpetual, *i.e.*, continuing for ever." In other words, it means a disposition of property which makes it inalienable for indefinite period. According to Blackstone, 'perpetuity' is the result of the desire of many men of property to rule beyond their lifetime from their graves by regulating the succession of their property.

The *rule against perpetuity* (also known as the *rule against remoteness)* prohibits the vesting of interests beyond a certain reasonable period. It prescribes the maximum period within which a future interest must, vest, and if the vesting is postponed beyond such period, the vesting is void for remoteness. Such maximum period is called the *perpetuity period.*

Perpetuity is against public policy. Law regards creation of 'perpetuity' against the public policy. All contrivances which tend to create it or place property for ever out of the reach of the excercise of the power of transfer are void. In *Stanley* v. *Leigh*, (1732) 2P. Wms. 686, it was observed by Jekyll, M.R.," a great mischief would arise to the public from estates remaining for ever or for a long time unalienable or untransferable from one hand to another, being a damp to industry, and a prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered."

Perpetuity period. Sec. 14 lays down the 'perpetuity period.' It provides that the 'perpetuity period' consists of the lifetime of one or more persons say *A B* and *C*, all living at the date of the transfer of property and the further period of minority of a person, say the eldest son of *C* (who shall be in existence at the expiration of that period) to whom the interest is to belong. In simple words, 'perpetuity period' is the life or lives in being and the further period of minority of a person.

Examples. (a) A transfers his property to his friend *B* for life and afterwards to his friend *C* for life and then to his friend *D* for life and then to the son of *B* for life and then to the son of *C* for life and then to the son that may be born to *D* forever. The property in this case can be transferred neither by *B* nor *C* or *D*, nor by the sons of *B* and *C* because these people have only a life interest. It is only when the property finally vests in *D's* son that it will be alienable by him. This acts as a restraint on the free transfer of property and to prevent this happening the law says that you cannot tie up property from generation to generation without giving any person absolute right of transfer. You can at the most tie up property and prevent its transfer only for one generation.

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(b) A fund is bequeathed to *A* for his life and after his death to such of the sons of *B* as shall first attain the age of 18. It is possible that when *A* dies a son may not have been born to *B* but is born only subsequently. Since the minor must be in existence on expiry of the life of *A*, the bequest after *A*'s death is void.

The rules contained in Sec. 14 as regards transfers to unborn perons may now be summed up as follows :

(1) If before property is ultimately transferred to an unborn person it is transferred to different persons one after another for their successive lives, they should all be living at the date of transfer.

(2) The unborn person must come into existence on or before the expiration of the existing life or lives named by the transferor.

(3) He must be given the entire estate of the transferor and the transfer must be absolute.

(4) The vesting of the estate cannot be postponed to a period longer than is necessary for him to attain majority.

Examples. (a) *A* transfers his property to *B* for life, and then to *C* for life and then to *D* for life and then to the son of *D* at the age of 18 absolutely. *B*, *C*, and *D* are living at the date of transfer. The transfer is valid.

(b) In the above case, If *D*'s son is not yet born and if the property is to be transferred to him at age of 20, the transfer to *D*'s son is invalid.

Exceptions to the rule against perpetuity. In the following cases, the rule against perpetuity does not apply :

1. *Gifts to charities, e.g.*, a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind.

2. Personal agreements, *i.e.*, agreements which do not create any interest in property.

3. Contracts for perpetual renewal of leases.

4. Covenants for redemption in a mortgage.

5. Covenants for pre-emption in respect of land unrestricted in point of time and expressed to be binding on the parties as well as their heirs and successors.

6. Charge created on a property. The creation of a charge is not a transfer of an interest in the property.

Transfer to a class some of whom come under Secs. 13 and 14 (Sec.15)

In the case or a transfer of property, an interest may sometimes be created in favour of a class of persons some of whom are in existence and some are not in existence (Sec. 13) at the date of transfer. If such an interest fails due to rules against perpetuity (Sec. 14) in the case of some persons, it will operate in regard to those persons only and not in regard to the whole class. Sec. 15 sums up this rule as follows :

"If, on a transfer of property, an interest therein is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of any

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of the rules contained in Secs. 13 and 14, such interest fails in regard to those persons only and not in regard to the whole class."

Example. A property is transferred to *A* for life and after his death to his sons who attain the age of 25. This is a transfer to a class. At the time of his death, *A* has three sons *B*, *C* and *D* aged 10, 8 and 5 years respectively. In this case *B* and *C* will attain the age of 25 within 18 years after the death of *A*. But this will not be so in case of *D*. Therefore, transfer will be operative in regard to *B* and *C* and inoperative in regard to *D*. Thus the transfer will not fail in its entirety. The persons *(i.e., B* and *C)* who are able to take property within the perpetuity period will take and the others *(i.e., D)* will not take.

The effect of Sec. 15 was explained by Mukherjee, J, in *Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer*, A.I.R. (1953) S.C.7, in the following words :

"It is quite true that no interest could be created in favour of an unborn person, but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the perons who are in existence at he time of the testator's death and is invalid as to the rest."

Transfer to take effect on failure of prior interest (Sec. 16)

Sometimes, an interest is intended to take effect after or upon the failure of a prior interest by reason of the rules contained in Secs. 13 and 14. In such a case when the prior interest fails, the subsequent interest also fails.

Example. A transfers his property to *B* and his intended wife successively for their lives and then to their eldest son for his life and then to *C*. The prior interest in favour of the son of *B* fails under Sec. 13, and therefore the subsequent interest in favour of *C* also fails [*Girjesh Dutt* v. *Data Din*, A.I.R. (1934) Oudh 35].

Where the prior interest fails not by reason of Sec. 13 or 14 but due to any other reason, the subsequent interest does not always fail.

Example. A made a bequest to his wife for life and after her death to his younger son by her. The bequest to wife failed for want of registration. *Held*, the gift to son was valid (*Ajudhia* v. *Rakhman Kuar*, I.L.R. 10 Cal. 482).

Fetters on transfer for public interest (Sec.18)

According to Sec. 18, the restrictions in Sec. 14 (which deals with 'rule aginst perpetuity'), Sec. 16 (which deals with transfer taking effect on failure of prior interest) and Sec. 17 (dealing with 'direction against accumulation') shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind.

The reason behind the rule contained in Sec. 18 is simple. Where some property is given for a purpose beneficial to public, it should not be frittered away. It should on the other hand be maintained in such a way that its income becomes available and is utilised for the beneficial purpose for which it was transferred. In view of this reason, fetters can be placed on further transfers of such property. Moreover, such property can be originally transferred for any number of years or the income of that property can be directed to be accumulated for any prieod for the purpose beneficial to the public.

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VESTED AND CONTINGENT INTERESTS
(Secs. 19 and 21)

Vested interest (Sec. 19)

'To vest' means "to clothe with legal rights". The term 'vested' is thus used in two senses, *viz.*,

1. vested in possession, or
2. vested in interest only.

Vested in possession. An interest is said to be 'vested in possession' when it gives a *present right to the transferee to the immediate possession or enjoyment of property.*

Vested in interest only. An interest is said to be 'vested in interest only' or 'vested and yet not in possession' when it gives *a present fixed right to the future possession or enjoyment of property.*

> *Example. A* transfers his land to *B* for life and then to *C*. *B*, in this case, has *vested interest in possession*. He has the immediate right to the possession of land. *C* has also a vested interest in the land even during the lifetime of *B* with a present fixed right of enjoyment of land on the death of *B*. The interest of *C* is not subject to any uncertain condition, as *B* is bound to die sooner or later. If *C* dies before *B*, *C*'s heirs will inherit the land [*Sundar Bibi* v. *Rajendra Narain*, A.I.R. (1925) All .339].

An interest is said to be vested when it is not subject to any condition precedent. When an interest is to take effect on the fulfilment of a condition, the condition is known as condition precedent. If the condition refers to an event the occurence of which is certain, the interest is a vested interest. In other words, the vested interest may follow the happening of the event, *e.g.*, death which must happen ; and the interest takes effect on the happening of that event.

A vested interest is not defeated by the death of the transferee. If the transferee dies before he takes possession of the property, it passes on to his heirs. The Transfer of Property Act regards a vested interest as a property which is divisible, transferable and heritable (*Ellokassee Dassee* v. *Durponarain*, 5 Cal. 59).

Sec. 19 deals with 'vested interest' and runs thus :

> "Where, on a transfer of property, an interest therein is created in favour of a person, *(i)* without specifying the time when it is to take effect, or *(ii)* in terms specifying that it is to take effect *(a)* forthwith, or *(b)* on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.
>
> A vested interest is not defeated by the death of the transferee before he obtains possession."

Contingent interest (Sec. 21)

'Contingent' means that which depends on the happening of an event. An interest created in favour of a person is a contingent interest if it is to take effect on the happening of a specified uncertain event which may or may not happen.

Sec. 21 deals with contingent interest. According to it, where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified

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uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception.—Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.

Examples. (a) A gift to *A* on the marriage of *B* creates a contingent interest for *B* may or may not marry. If *B* marries, the contingent interest becomes vested.

(b) An estate is bequeathed to *A* until he shall marry and after his marriage it is to pass to *B*. The interest of *B* in the estate is contingent because *A* may or may not marry. It becomes vested interest as soon as *A* marries.

(c) *A* transferred property to *B* for life and then to her adopted son. If *B* died without adoption, the property was to pass to *C*. *Held*, *C* obtained only contingent interest [*Natvar Lal* v. *Ranchhod Bhagwan Dass*, A.I.R. (1920) Bom 295].

(d) *A* bequeathed property to his wife for her lifetime and thereafter to his nephew if he remained faithful to his wife. *Held*, the interest of the nephew was contingent [*Natha Lal* v. *Bai Manik*, A.I.R. (1944) Bom. 196].

It will thus be seen that a contingent interest takes effect or becomes vested interest only after the condition precedent is satisfied.

Difference between vested interest and contingent interest

1. *Fulfilment of condition.* Vested interest does not depend upon the fulfilment of any condition. Contingent interest depends upon the fulfilment of some condition precedent or on the happening of some event which may or may not happen.

2. *Right of enjoyment.* In vested interest, there is a present immediate right though its enjoyment may be postponed to some future date. In a contingent interest right of enjoyment is to accrue on the happening of an event which is uncertain.

3. *Effect of transferee's death.* Vested interest is not defeated by the death of the transferee before he obtains possession. Contingent interest does not take effect in the event of the transferee's death before the fulfilment of the condition.

4. *Transferability and heritability.* Vested interested is both transferable as well as heritable. Contingent interest is not transferable. Whether it is heritable or not depends on the nature of the contingency.

If the transferee of a vested interest dies, the interest passes on to his heirs. If the transferee of a contingent interest dies before obtaining possession, the interest fails and does not pass on to his heirs.

DOCTRINE OF ELECTION
(Sec. 35)

A man cannot blow hot and cold

Election means 'choice'. The principle underlying the doctrine of election is that a man is not to be heard who says things contradictory to each other.

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In other words a man cannot *approbate and reprobate* or blow hot and cold. In simple words, it means that a man taking a benefit under an instrument must also bear the burden (*Codrington* v. *Lindsay*, 8 Ch. 578).

Example. A transfers his house to *B*, by a gift and in the same gift deed asks *B* to transfer his shop to *C*. If *B* wants to have the house, he must transfer his shop to *C*. *B* is now put to election. He may elect to have the house in which case he will have to transfer the shop to *C*, or he may reject the transfer in which case he neither gets the house nor the burden of transferring the shop to *C*.

The 'doctrine of election' is dealt with in detail in Sec. 35 which is discussed below :

Where a person professes to transfer property which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it. If he dissents from it, he shall relinquish the benefit so conferred, and the benefit so conferred, and the benefit so relinquished shall revert to the transferor or his representative as if it had not been disposed of.

Thus where a deed bestows a benefit on a person, he cannot accept the benefit and reject the burdensome provisions under the deed.

Examples. (a) The farm of Meerut is the property of C and worth Rs. 8,00,000. *A*, by an instrument of gift professes to transfer it to *B*, giving by the same instrument Rs. 10,00,000 to *C*. *C* elects to retain the farm. He forfeits the gift of Rs. 10,00,000.

If *A* dies before the election, his representative must, out of Rs. 10,00,000, pay Rs. 8,00,000 to *B*.

(b) A bequeathes an estate to *B* in case *B*'s elder brother (who is married and has children) shall leave no issue living at his death. He also bequeathes to *C* a jewel which belongs to *B*. *B* must elect to gift up the jewel or to lose the estate.

In case the person upon whom, a benefit is conferred rejects it, the property which was attempted to be transferred to him will revert to the transferor and it is he who will compensate the disappointed transferee. Thus the reversion of the benefit to the transferor is subject to the charge of making good to the disappointed transferee the amount or value of the property attempted to be transferred to him where—

(1) the transfer is gratuitous, and the transferor has, before the election, died or otherwise become incapable of making a fresh transfer, and

(2) the transfer is for consideration.

Example. A transfers his house worth Rs. 50,000 to *B* and by the same deed of transfer asks *B* to transfer his shop worth Rs. 20,000 to *C*.If *B* does not accept the transfer, the property reverts to *A*. So long *A* is alive he will have have to compensate *C* (the disappointed transferee) and if *A* dies, before *B* makes his election, the heirs of *A* will have to compensate *C* from *A 's property to the extent of Rs.20,000.*

The rule in Sec. 35 applies whether the transferor does or does not believe that which he professess to transfer to be his own.

A person taking no benefit directly under a transaction, but deriving a benfit under it indirectly, need not elect. Moreover, a person who in his one capacity takes a benfit under the transfaction may in another dissent therefrom.

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It should be noted that the question of election arises only when a transfer is made by the same document. If the transferor makes a gift of property by one deed and asks the donee by another to part with his own property, there is no question of election.

Example. *A* transfers his house to *B* by a transfer deed. By another deed, he transfers *B*'s property to *C*. Here *B* is not put to election. He can retain the property given to him by *A* and refuse to transfer his property to *C* as the two transfers do not form part of the same document.

Exception. Sometimes the transferor of a property (which belongs to another person) may confer, by the same transaction and under the same instrument, on the owner of the property two kinds of benefit, *viz.*, one in lieu of his property which the transferor transfers to someone else, and the other as a gift without any consideration at all. In such a case if the owner of the property elects to retain the property, he must relinquish the particular benefit which is expressed to be in lieu of that property, but he is not bound to relinquish the other benefit (which is a gift without consideration).

Example. Under *A*'s marriage settlement his wife is entitled if she survives him, to the enjoyment of the estate of Saharanpur during her life. *A*, by his will, bequeathes to his wife an annuity of Rs. 20,000 during her life in lieu of her interest in the estate of Saharanpur, which estate he bequeathes to his son. He also gives his wife a legacy of Rs. 1,00,000. The widow elects to take what she is entitled to under the settlement. She is bound to relinquish the annuity but not legacy of Rs. 1,00,000.

When election is said to have been made?

Election is a question of intention of the person (donee) on whom a benefit is conferred. It may be express or implied by conduct. Thus acceptance of the benefit by the donee constitutes an election by him to confirm the transfer, if he is aware of his duty to elect, and of those circumstances which would influence the judgment of a reasonable man in making an election, or if he waives enquiry into the circumstances. Such knowledge or waiver shall, in the absence of evidence to the contrary, be presumed, if the person on whom the benefit has been conferred, has enjoyed it for 2 years without doing any act to express dissent.

Example. *A* transfers to *B* an estate to which *C* is entitled, and as part of the same transaction gives *C* a coal-mine. *C* takes possession of the mine and exhausts it. He has, thereby, confirmed the transfer of the estate to *B*.

Period of electon. If the owner does not within 1 year after the date of the transfer signify to the transferor or his representatives his intention to confirm or to dissent from the transfer, the transferor or his representatives may, upon the expiration of the period, require him to make election. If the owner does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the transfer.

In case of disability, the election shall be postponed until the disability ceases, or until the election is made by some competent authority.

DOCTRINE OF LIS PENDENS OR LITE PENDENTE (Sec. 52)

Nothing new can be added during the pendency of a suit

Meaning of lis pendens. The expression *lis pendens* means a *pending litigation.* The doctrine of *lis pendens* is expressed in the maxim *"ut lite*

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pendente nihil innovateur" which means nothing new should be introduced during the pendency of a suit. The doctrine may be explained with the help of the following example.

Example. There is a dispute between *A* and *B* with regard to ownership of property *X*. *A* files a suit against *B* in a law Court. A may either win or lose the suit. If he wins, he gets the property. If he loses, *B* gets the property. Now suppose during the pendency of the suit, *A*, professing to be owner of the property sells it to *C*. If the suit ends in *A*'s favour, no difficulty arises. If it ends in *B*'s favour, *C* cannot retain the property. *C* is bound by the decree of the Court and must return the proerty to *B*. He cannot even take the plea that he had no notice of the pending litigation. This is the doctrine of *lis pendens*.

The doctrine of *lis pendens* as contained in Sec. 52 may be summarised thus : Where a suit or proceeding is pending in any Court between two persons with respect to any immovable property, the property cannot be transferred or otherwise dealt with by any party except under the authority of the Court. If any party transfers or otherwise deals with that property, the transferee will be bound by the result of the suit or proceeding, whether or not he had notice of the suit or proceeding.

The principle of the doctrine is explained by Turner, L.J. in the leading case of *Bellamy* v. *Sabine*, (1857) 1 De. G. & J. 566 as follows :

> "It is as I think a doctrine common to the Courts both of Law and Equity and rests, as I apprehend, on the foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendants alienating before the judgment or decree, and would be driven to commence his proceedings, de novo, subject again to be defeated by the same course of proceedings."

Doctrine not based on notice. The application of the doctrine of *lis pendens* does not depend upon the transferee having notice of the pending suit or proceeding. This has been explained in the above case by Lord Cranworth in the following terms :

> "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute so as to prejudice the opposite party."

The leading case on doctrine of *lis pendens* in India is :

> *Faiyaz Hussain Khan* v. *Prag Narain*, 29 All. 339. In this case a mortgagee filed a suit to enforce his mortgage. Before the summons were served, the mortagagor created another mortgage on the property. The first mortgagee obtained a sale-order from the Court, without making the second mortgagee a party to the suit. *Held*, the sale extinguished the second mortgagee's right to redeem the prior charge.

Conditions necessary for the doctrine. The following conditions must be fulfilled for the application of the doctrine of *lis pendens* :

1. There must be pendency of a suit or proceeding. The 'pendency of a suit or proceeding' starts from the time a plaint is presented in Court of competent jurisdiction. If the transfer of property takes place before the presentation of plaint in law Court, the transfer is not subject to *lis pendens* as the gift was made prior to the suit filed by the wife.

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Example. *A* made a gift of his house to *B*. Later his wife sued him for maintenance and claimed a charge over the house. During the pendency of the suit, *B* transferred the property to *C*. This transfer is not subject to lis pendens as the gift was made prior to the suit filed by the wife.

2. The suit or proceeding must be one in which a right to immovable property is directly and specifically in question.

3. The suit or proceeding must be pending in a competent Court.

Example. A court returned a plaint on the ground that it had no pecuniary jurisdiction. A fresh plaint was filed in a proper Court two years later. In the meantime, the defendant gifted the property to his wife and son. *Held*, the gift was not affected by *lis pendens* as there was no suit pending in a competent Court at the time of alienation [*Govinda Pillai* v. *Aiyyappan Krishna*, A.I.R. (1954) Ker. 10].

4. The suit or proceeding must not be collusive. Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose.

5. The property in the suit or proceeding must have been transferred or otherwise dealt with by any of the parties to the suit or proceeding during the pendency of the suit or proceeding.

6. The alienation must affect the rights of the other party to the suit or proceeding.

When these conditions are satisfied, the doctrine of *lis pendens* applies and the alienation will become subservient to the ultimate result of the litigation.

DOCTRINE OF FRAUDULENT TRANSFER
(Sec. 53)

A debtor may sometimes, with intent to defeat or delay his creditors, transfer his property to one of his friends or relatives. He may also do so to defraud of a subsequent purchaser. If there is any such transfer, it can be avoided under Sec. 53.

Transfer with intent to defeat or delay the creditors. Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be *voidable* at the option of any creditor so defeated or delayed.

Thus where a person transfers his property purporting to defeat or delay his creditors, such a fraudulent transaction can be set aside at the instance of the creditor whose interest had been defeated or delayed as a result of the fraudulent transfer [*Rajmal* v. *Moti*, A.I.R. (1956) Bhopal 22]. The transfer is valid so long as the creditor does not challenge it in the Court and get a declaration that the transfer is void. The creditor will have to satisfy the Court that the intention of the debtor was to defeat his rights or delay payment to him. Further Sec. 53 does not impair the rights of a transferee in good faith and for consideration. It also does not affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to set aside a fraudulent transfer can be instituted on behalf of all the creditors.

Transfer with intent to defraud subsequent transferee. Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be *voidable* at the option of such transferee.

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Further no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

Sec. 53 is applicable to transfer of immovable property and not to movable property.

SECTION 2—SALES OF IMMOVABLE PROPERTY
(Secs. 54 to 57)

'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised (Sec. 54).

The essential ingredients of a 'sale' are as follows :

1. *Transfer of ownership.* 'Sale' means transfer by the owner of all his rights over, and interests in, the property to the buyer. Any subsequent purchaser from the original owner would not get any rights over, and interests in, that property. If the owner transfers only interest in part and reserves the rest for himself, there is no transfer of ownership.

A 'sale' must be distinguished from a 'hire purchase agreement'. A simple test to determine whether a contract is a sale or a hire purchase agreement is this : Where the transferee has a right to terminate the agreement at his will and is not bound not pay the entire price, it is a hire purchase agreement. The hire-purchaser must not however be compelled to excercise the option. Where the transferee has no right to terminate the agreement and is bound to pay the full price, the agreement is a sale [*Finance Centre* v. *Ram Parkash*, A.I.R. (1977) N.O.C. 269 (J. & K.)].

2. *Subject-matter.* The subject-matter of sale is immovable property. The Transfer of Property Act deals with sale of 'immovable property'. The sale of movable property is governed by the Sale of Goods Act, 1930.

3. *Price.* Price is an essential ingredient of sale. It is really the essence of a transaction of sale. In the absence of it, the transfer is not a sale.

The term 'price' is not defined in the Act. It has the same meaning as under the Sale of Goods Act, 1930. It means, as has been held in a number of cases, money only [*Talib Ali* v. *Kaniz Fatima Begum*, A.I.R. (1927) Oudh 204].

A contract of sale of immovable property which does not fix the price or privide a specific mode or manner in which the price can be ascertained is not enforceable at law either in a suit for pecific performance or for damages. No such presumption that a reasonable price would be payable, as is the case in case of sale of goods, is upheld.

The price may be paid or promised or part-paid and part-promised. Payment of price is not essential ; but fixation of price is. Where the parties intend that the property should pass on registration of deed, the sale is complete and the ownership passes as soon as the deed is registered irrespective of the fact whether the price has been paid or not.

Contract of sale (Sec. 54). A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not of intself create any interest in, or charge on, such property.

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Mode of sale (Sec. 54)

Sale is a transfer of ownership in property in exchange for a price. According to Sec. 54 it, there are two modes of effecting sale.

1. *By registered instrument.* —Sale in the case of tangible immovable property of the value of Rs. 100 or upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

'Tangible property' is that which can be perceived by touch or which can be touched physically, *e.g.*, land and building. 'Intangible property' is that which can neither be perceived nor touched and yet it stands in relation to a certain thing, *e.g.*, a mortgage debt; the interest of a mortgagee in a simple mortgage, the right of the mortgagor to redeem in case of usufructuary mortgage.

Sec. 9 provides that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. Sec. 54 provides an exception to this rule. A sale of immovable property of a value above Rs. 100 is ineffective if it is not effected by a registered instrument.

2. *By delivery of possession.* Sale in the case of tangible immovable property of a value of less Rs. 100 can be effected either *(a)* by a registered instrument, or *(b)* by delivery of the property.

Delivery of property takes place when the seller places the buyer, or such person as he directs, in possession of the property. The possession may be given in physical form or symbolically. For example, when a piece of land is sold, the purchaser may be taken to the land and pointed out the area sold to him by showing him the pillars on the four corners of the land (*Hanmanta* v. *Mir Ahmodin*, 6 Bom. L.R.1104) . It is not necessary that the seller and purchaser should walk over the whole land or that the purchaser should occupy every nook and corner of the land sold to him. The possession of a house may be given by handing over the keys to the purchaser. This is symbolic delivery.

LIABILITIES AND RIGHTS OF BUYER AND SELLER (Sec. 55)

The liabilities and rights of buyer and seller are discussed in Sec. 55. These are, it should be noted, subject to a contract to the contrary. The opening words of Sec. 55 are as follows :

> "In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold."

The 'rules next following' deal with the liabilities and rights of buyer and seller before and after completion of sale. These rules are implied in every transaction of sale *unless* these are specifically and expressly excluded by agreement between the parties. These are just like conditions and warranties in a contract of sale of goods under the Sale of Goods Act, 1930.

The liabilities and rights of buyer and seller may be discussed under the following two heads :

I. Before the completion of sale.

II. After the completion of sale.

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I. Seller's liabilities and rights before the completion of sale

Liabilities. 1. *Disclosure of material defects.* The seller is bound to disclose to the buer any material defect in the property or in his own title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not, with ordinarty care, discover. A material defect is of such a nature that if the buyer had been aware of it, he would not have entered into contract at all, "for he would be getting something different from what he contracted to buy." [*Flight* v. *Booth*, (1834) Bing (N.C.) 370].

Example. A land was sold for building purposes. The seller failed to disclose that the land was agricultural land. *Held*, there was a non-disclosure of a material defect and a breach of duty on the part of the seller [*Jhamak Lal* v. *Mishri Lal*, A.I.R. (1957) M.B. 23].

The material defect may be *(a)* a latent defect, or *(b)* a patent defect. A *latent defect* is one which the seller is, and the buyer is not, aware, and which the buyer cannot with ordinarly care and diligence discover. A *patent defect* is one of which a purchaser has knowledge or which he may with ordinary diligence discover. The seller is under obligation to disclose all latent defects but not patent defects [*Gwasha Lal* v. *Kartar Singh*, A.I.R. (1961) J. & K. 66].

Examples of latent defects. *(a)* Defects in a ship's bottom when sold afloat.

(b) An underground drain in a land sold for building purposes.

Examples of patent defects. *(a)* A building in a runious state.

(b) An open footpath over the land sold.

An omission to make disclosure of material defects is fraudulent. If the seller does not disclose any material defect, the buyer has two remedies against the seller :

(a) If the buyer discovers the material defect before he accepts the conveyance, he may rescind the contract for fraud or accept the conveyance and claim damages. He may also successfully oppose a suit for specific performance by the seller.

(b) If he discovers the material defect after he accepts the conveyance, he may sue to set aside the contract and claim damges on the ground of fraud.

2. *Production of title deeds.* The seller is bound to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power. The seller is not bound to produce these documents if the buyer does not make any such request. If the buyer asks for the production of title deeds, the seller is bound to produce not only those documents which are in his possession or power but also those which may be in his power to produce. If the purchaser insists on the production of documents which are not in the possession or power of the seller and which the seller did not undertake to produce, the seller mmay rterinate the contract. If the seller fails to produce the documents for inspection, the buyer is entitled to terminate the contract.

The documents are usually made available for inspection at the seller's residence or at his attorney's residence. If the purchaser wants the documents

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to be produced somewhere else for inspection, he may get it done on payment of extra cost, if any, involved.

3. *Duty to answer questions.* The seller is bound to answer to the best of his information all relevant questions put to him by the buyer in respect of the property or the title thereto. The questions put or inquiries made by the buyer must be specific and not ambiguous or vague (*Ford* v. *Hill*, 10 Ch. D. 365). The seller is bound to disclose material defects, even if the buyer does not request the seller to produce the title deeds for inspection , or does not make any specific inquiries.

If the seller gives a false answer to any question put by the buyer, he is guilty of fraud.

4. *Execution of conveyance.* The seller is bound, on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders the conveyance to him for execution at a proper time and place.

When the buyer satisfies himself about the title of the seller to the property, he must prepare a conveyance and then tender it to the seller for execution. After the buyer performs his duty (*i.e.*, pays or tenders the price and tenders a conveyance of the property) it becomes the duty of the seller to execute the conveyance.

The tender of price and proper conveyance must be made within the time fixed by the contract or if no time is fixed, within a reasonable time. The seller must also execute the conveyance within the time fixed by the contract or if no time is fixed, within a reasonable time. If there is an unreasonable delay in so doing, either party can give notice to the other party making time as the essence of the contract, provided the time fixed is reasonable.

The payment or tender of the amount due has to be made at the seller's residence or his usual place of business. The place for execution of conveyance is, unless otherwise agreed, the seller's residence or his solicitor's office.

5. *Reasonable care of property.* Between the date of the contract of sale and the delivery of the property, the seller is bound to take as much care of the property and all documents of title relating thereto as an owner of ordinary prudence would take of such property and documents.

The seller is in the position of a trustee for the buyer and his duties are similar to the duties of a trustee under Sec. 15 the Indian Trusts Act, 1882. This duty continues upto the time the property and the documents of title are delivered to the buyer. If the seller fails in this duty, the buyer will be entitled to an allowance by way of compensation to be deducted from the purchase money, and after the completion of conveyance he may claim damages.

6. *Payment of charges.* The seller is bound to pay all public charges and rent accrued due in repect of the property upto the date of the sale and the interest on all incumbrances on such property due on such date. Further, except where the property is sold subject to incumbrances existing at the date of sale, he is also bound to discharge all existing incumbrances on the property. If owing to the seller's default to pay any of these expenses or incumbrances the buyer is compelled to pay,

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he is entitled to recover the amount paid (Sec. 69 of the Indian Contract Act, 1872). The buyer can also compel the seller to discharge the incumbrances existing at the date of sale.

Rights. The seller has only one right before the completion of sale. He is entitled to the rents and profits of the property till the ownership thereof passes to the buyer. If he refuses to execute conveyance, the buyer can sue for specific performace and compensation (in the nature of *mesne* profits) from the date when the deed should have been executed and possession given [*Hariprasad* v. *Harihar*, A.I.R. (1923) Pat. 205].

Buyer's liabilities and rights before the completion of sale

Liabilities. 1. *Duty to disclose facts.* The buyer is bound to disclose to the seller any facts as to the nature or extent of the sellers' interest in the property of which the buyer is aware but of which the seller is not aware and which materially increases the value of such interest. If he fails to make any such disclosure, it amounts to fraud on his part and the seller may set aside the sale.

Example. An old woman sold her property at a gross undervalue. She believed that she could not make out good title to the property. The purchaser however knew that she could do so. *Held*, there was omission to make disclosure and the sale was set aside as fraudulent (*Summers* v. *Griffiths*, 35 Beav. 27).

The buyer is however under no duty to disclose latent advantages of the property.

2. *Duty to tender price.* The buyer is duty bound to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs. Where the property is sold free from incumbrances the buyer may retain, out of the purchase-money, the amount of any incrumbrances on the property existing at the date of the sale. The buyer shall pay the amount retained on account of any incumbrances to the persons entitled thereto.

Rights. Sometimes it may happen that although under a contract of sale the buyer has paid to the seller some earnest money or part of full price of the property, the seller refuses to complete the sale. In such a case, the buyer has the right to sue for specific performance or in the alternative to sue for damages and return of the price paid. He is also entitled to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount paid by him to the seller and interest thereon. But in order to excercise this right, the buyer must not have improperly declined to accept delivery of the property. Where he properly declines to accept the delivery, he is entitled to a charge for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.

Earnest. Quite often in a contract of sale the buyer may give a nominal sum to the seller as a token that the parties are in earnest or have made up their minds. In *Kunwar Chiranjit* v. *Har Swarup*, A.I.R. (1926) P.C. 1, it was observed that "earnest money is a part of the purchase price when the transaction goes forward ; it is forfeited when the transaction falls through by reason of the fault or failure of the vendee."

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A comparison of the buyer's charge and the seller's charge shows that whereas the former arises when the price or part of it is paid in anticipation of delivery, the latter arises on delivery of possession in respect of the unpaid price. Further, the former subsists till the conveyance is executed and possession is delivered, the latter subsists till the price is fully paid.

II. Seller's liabilities and rights after the completion of sale

Seller's liabilities. 1. *Delivery of possession.* The seller is bound to give to the buyer possession of the property. The nature of the possession depends upon the nature of the property, unless some mode is specified in the contract to the contrary. For example, where the property sold is a house in the possession of the seller, the nature of possession would be delivery of the vacant house [*Subba Rao* v. *Vasudevasastry*, A.I.R.(1956) A.P. 113]. Where the property sold is in the possession of tenants, the nature of possession would be delivery of the title deeds of the property.

The seller's liability to give possession of the property arises usually when ownership passes to the buyer. As to when the ownership passes to the buyer depends upon the intention of the parties. In the absence of such intention, it passes immediately on the execution and registration of the sale deed. The seller cannot refuse to give possession to the buyer on the ground that the price has not been paid to him. In a suit by the buyer for possession without paying the price, some High Courts have passed a conditional decree for delivery of possession subject to the payment of unpaid price ; whereas some other High Courts have taken a view that the plain language of the Section must be given effect to without importing equitable considerations.

The obligation to give possession is on the seller and not on the buyer to go and take possession.

2. *Implied covenant of title.* The seller's liability with respect to covenant of title arises after the completion of sale. In every conveyance the seller is deemed to contract with the buyer that the interest which he professes to transfer to the buyer subsists, and that he has power to transfer the same. This implied covenant of title is absolute and unconditional. The seller is liable to the buyer in damages for breach of this covenant.

The buyer has a right to satisfy himself before the completion of the sale whether the title of the seller is free from reasonable doubt. If in spite of his investigation and satisfaction, the title of the seller turns out to be defective, he can hold the seller liable in damages and can claim back the purchase money if he is dispossessed on account of a defect in title.

Where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring.

Further the seller is bound to give title that is marketable. A title is said to be marketable when it is free from reasonable doubt, not only that it is good but that it is undubitable (that cannot be doubted, certain), a title which is reasonably free from such doubts as would affect the market value of the property [*Shankerlal* v. *Jethmal*, A.I.R. (1961) Raj. 196].

3. *Delivery of title deeds.* Before the sale, the seller is bound to produce the title deeds for the buyer's inspection at his request ; but after the sale, he

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is bound to deliver the title deeds as soon as the whole of the purchase price has been paid to him. He must not only deliver the title deeds in his possession but also those which he has power to produce.

In the following two cases the title deeds need not be delivered to the buyer :

(a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and

(b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents.

But in case *(a)* the seller, and in case *(b)* the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, to produce the said documents and furnish such true copies thereof or extras thereform as he may require. The cost involved in producing the documents or furnishing their copies will have to be borne by the person making the request. In the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by fire or other inevitable accident.

Seller's rights. Where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, the seller is entitled to a lien or charge upon the property in the hands of the buyer. This right of the seller is known as *seller's lien*. This lien is available to the seller against the property in the hands of not only the buyer but also against any transferee without consideration or any transferee with notice of the non-payment. Further the seller is entitled to a charge for the amount of the purchase money, or any part thereof remaining unpaid, and for interest on the unpaid price from the date on which possession has been delivered.

Buyer's liabilities and rights

Buyer's liabilities. 1. *Duty to bear loss.* Where the ownership of the property has passed to the buyer, the buyer is bound to bear any loss arising from the destruction, injury, or decrease in value of the property not caused by the seller. The reason for this rule is simple. After the transfer of ownership, the buyer becomes the owner of the property. Any loss caused to the property (except the one caused by the seller) after the transfer of ownership is to be borne by the buyer.

Before the completion of sale, this loss is to be borne by the seller.

2. *Duty to pay public charges and rent.* Where the ownership of the property has passed to the buyer, as between himself and the seller, the buyer is bound to pay all public charges and rent which may become payable in respect of the property. The buyer is also bound to pay the principal moneys due on any incumbrance subject to which he has bought the property, and the interest thereon afterwards accruing due. Where the seller is bound to make a payment in respect of the property, which he failed to pay, the buyer may afer paying recover it from the seller. Where the buyer himself is bound to pay, he cannot recover it from the seller. If a charge is partly payable by the seller as due before the sale, and partly by the buyer as due after the sale, and the amount is wholly paid either by the seller or by the buyer, apportionment by time is made between the seller and the buyer.

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Buyer's right. Where the ownership of the property has passed to the buyer, he is entitled to the benefit of any improvement in, or increase in value of, the property. He is also entitled to the rents and profits derived from such improvement in the property.

Other provisions relating to sale

Marshalling by subsequent purchaser (Sec. 56). Sec. 56 provides that the purchaser of one of the several properties already mortgaged with some one else has the right to have the mortgage debt satisfied out of the property or properties not sold to him. This right is called the right of *marshalling* by a subsequent purchaser. According to Sec. 56, where the owner of two more mortgaged properties sells one of them to another, the purchaser has the statutory right to insist on the mortgage-debt being satisfied out of the property or properties not sold to him. But this right of the purchaser cannot prejudice the rights of the mortgagee or persons claiming under him. Nor can this right be enforced if there is a contract to the contrary.

Example. O, the owner of three properties P_1, P_2 and P_3, mortgages them to *M*. Subsequently *O* sells the property P_1 to *B*. Here *B* has the right of marshalling, *i.e.*, he can compel *M* to satisfy his mortgage-debt out of properties P_2 and P_3 so far as it will extend.

The right of marshalling given to the buyer is not impaired even by the fact that the buyer has notice of the fact that the property sold to him is subject to a mortgage together with some other properties. But this right is subject to a contract to the contrary. Such a contract may be express or implied.

Example. A purchaser of one of several mortgaged properties undertook to pay and discharge the mortgage-debt out of the consideration money. He failed to do so. The mortgagee filed a suit for the sale of the property purchased by the buyer. The buyer claimed that the property purchased by him should be sold last of all. *Held*, from the very circumstances of the case it could be presumed that there was contract to the contrary within the meaning of Sec. 56 and the buyer was not entitled to marshalling [*Achanta Venkata v. M.Venkayamma*, A.I.R. (1946) Mad. 59].

Discharge of incumbrances on sale (Sec. 57). Sec. 57 lays down the procedure for discharge of an incumbrance on an immovable property which is sold free from it. It provides for the discharge of incumbrances on the sale of immovable property subject to any incumbrance (whether immediately payable or not) either—

(1) by the Court, or

(2) in execution of a decree, or

(3) out of the Court.

The Court will act on the application of any party to the sale, but its power is discretionary in granting the application. Further, it may, if it thinks fit, give notice to the incumbrancer in order to ascertain the amount due on the incumbrance. The incumbrances are as follows :

(1) In case of an annual or monthly sum charged on the property, such amount must be paid as, when invested in securities of the Central Government, the Court considers will be sufficient, by means of the interest thereof, to keep down the charge.

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(2) In any other case of a capital sum charged on the property—the amount so paid shall be such as will be sufficient to meet the incumbrance and any interest due thereon.

In either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses and interest, and any other contingency except depreciation of investments. This additional sum to be paid shall not exceed one-tenth part of the original amount to be paid in, unless the Court for special reasons (which it shall record) thinks fit to reqire a larger additional amount.

Thereupon the Court may, if it thinks fit, declare the property to be freed from the incumbrance. It may also direct payment or transfer of the money to the persons entitled to receive or give a discharge for the same. It may also generally give directions respecting the application or distribution of the capital or income thereof, if the amount had been invested under the directions of the Court.

An appeal shall lie from any declaration, order or direction under Sec. 57 as if the same were a decree.

SECTION 3—MORTGAGES OF IMMOVABLE PROPERTY AND CHARGES

MORTGAGE

When some immovable property is offered as security for a loan, the transaction is called a mortgage. It is "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary libility".

The transferor is called a '*mortgagor*' and the transferee a '*mortgagee*' ; the principal money and interest of which payment is secured for the time being are called the '*mortgage-money*' ; and the instrument (if any) by which the transfer is effected is called a '*mortgage-deed*' [Sec. 58 *(a)*].

Characteristic of a mortgage

A mortgage is a contract. It must, therefore, have all the essential elements of a valid contract. The other main characteristics of a mortgage are as follows :

1. *Writing and registration.* Generally a valid mortgage can be effected only by a written and a registered document. But in Bombay, Calcutta and Madras and other notified towns, it can be created by depositing the title deeds of property with the mortgagee and no writing or registration is required. Further, if the sum secured is less than Rs. 100, no writing and registration is required and a valid mortgage can be created by delivery of possession of property.

2. *Transfer of interest in specific immovable property.* A mortgage involves the transfer of an interest in some specific immovable property. The actual possession of the property need not always be transferred to the mortgagee. But the property intended to be mortgaged must be specific and it should be identifiable by its location, size, boundaries, etc.

In practice, the requirements of a mortgage would be satisfied if a specific, as distinguished from general, description of the property is given. What is

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essential is that the description should not be vague, like 'only house and landed property', or 'the whole of my property'. Thus where in a document no specific immovable property was mentioned to serve as a security for the loan and it was merely stated that 47 bighas of land belonging to the mortgagor was given, it was held that no mortgage was created [*Tara Singh* v. *Lehna Singh*, (1970) P.L.R. 312].

If the immovable property is not specifically and distinctly mentioned in mortgage-deed the Court cannot grant a decree for the sale of any property on a suit by the mortgagee, should the mortgagor make a default in repaying the loan.

In case of more than one co-owners of an immovable property, each co-owner can mortgage his share in property.

3. *Transfer of interest by way of security.* The transfer of an interest in specific immovable property must be by way of security. The security must be for repayment of a loan or the performance of an engagement which gives rise to a pecuniary liability or which results in a monetary obligation. The word 'engagement' here means a contract as defined in Sec. (2) *(h)* of the Indian Contract Act, 1872. It includes cases where the breach of the engagement will give rise to a right to claim damages. The mortgage may be created for a loan already taken or for a loan which the mortgagor intends to take. The relationship between a mortgator and the mortgagee is that of a debtor and a creditor.

A transfer of property in discharge of a debt is not mortgage.

It should be noted that from the date of the mortgage, the mortgaged property is split up into 2 parcels of distinct interests—one of which becomes vested in the mortgagee and the other which remains with the mortgagor. Thus the mortgagor only parts with some of his rights over the property when he creates a mortgage on that property. After mortgage his interest in the property is reduced by the quantum of interest transferred to the mortgagee. The remaining rights of ownership still remain with him and in spite of the mortgage, he is the owner of the property (though his ownership, in effect, is less for the time being by the interest which has been transferred in favour of the mortgagee).

4. *Sale of subject-matter.* If the mortgagor fails to discharge his liability or fulfil his obligation within the agreed time, the mortgaged properly can be sold through the Court and the amount of the loan recovered out of the sale proceeds.

5. *Interest re-conveyed.* On the repayment of the amount of the loan and the interest due thereon, the interest in the mortgaged property is re-conveyed to the mortgagor.

TYPES OF MORTGAGE

Sec. 58 classifies the mortgages into the following six types:

1. Simple mortgage [Sec. 58 *(b)*].
2. Mortgage by conditional sale [Sec. 58 *(c)*].
3. Usufructuary mortgage [Sec. 58 *(d)*].
4. English mortgage [Sec. 58 *(e)*].

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5. Mortgage by deposit of title deeds [Sec. 58 *(f)*].
6. Anomalous mortgage [Sec. 58 *(g)*].

1. Simple mortgage [Sec, 58 *(b)*]

In case of a simple mortgage, the mortgagor, without delivering possession of the mortgaged property, gives a personal undertaking to the mortgagee to repay the amount due under the mortgage. The personal unertaking to pay may be either express or implied. Where there is no such undertaking, express or implied, the mortgage is not a simple mortgage. Thus in case of simple mortgage, the mortgagor retains the possession of the property but agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have the right to have mortgaged property sold through the Court and the proceeds of sale applied in payment of the mortgage-money to the extent necessary. If the sale proceeds are insufficient to discharge the debt, the mortgagor is personally liable for the balance of the amount. In such a case, the mortgagee can bring a personal action against the mortgagor and obtain a decree from the Court. The decree can be executed against the other properties of the mortgagor like any other money decree.

2. Mortgage by conditional sale [Sec. 58 *(c)*]

In this case, the mortgagor ostensibly sells the mortgaged property on one of the following conditions :

(1) That on default of payment of the mortgage-money on a certain date, the mortgagor agrees that the sale shall become *absolute*.

(2) That if the mortgagor pays the mortgage-money on the agreed date, the mortgagee agrees that the sale shall become *void*.

(3) That on the payment being made by the mortgagor on the fixed date, the mortgagee agrees to transfer the property mortgaged to the mortgagor. It is essential that such a condition is embodied in the mortgage-deed itself. When such a condition is embodied in the mortgage-deed, the transaction is called a mortgage by conditional sale and the mortgagee is called a mortgagee by conditional sale.

In effect, this type of mortgage is a sale of the mortgaged property with the superadded condition of repurchase by the mortgagor of the mortgaged property by repaying the loan. Thus the essential characteristic of a mortgage by conditional sale are as follows :

(1) The mortgagor has a right of redemption.

(2) When he repays the amount due, the sale becomes void.

(3) If he makes a default in paying the amount due on the stipulated date, the sale becomes absolute and binding.

(4) There is no personal covenant on the part of the mortgagor to pay.

(5) Delivery of possession of the property is not given to the mortgagee.

Mortgage by conditional sale distinguished from a sale with a condition of repurchase. In a mortgage by conditional sale the transaction is really a mortgage. Although it contemplates the ostensible sale of property by the mortgagor, the mortgagor (the ostensible seller) has a statutory right to redeem the property.

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In a sale with a condition of repurchase, the transaction is an out-and-out sale. The seller has the personal right to ask for the retransfer of property on the terms and conditions contained in the agreement to retransfer the property to him. In this case, time is of the essence of the contract and once the stipulated time is allowed to elapse, the seller forfeits the right to get back the property. Further the ownership vests in the transferee from the date of the execution of document of sale with a condition of repurchase.

In determining whether a given transaction is a mortgage by conditional sale or an out-and-out sale with a condition of repurchase, the following tests may be applied :

(1) *Intention.* It is the intention of the parties at the time of entering into the contract which would essentially determine the nature of the transaction. The intention is gathered from the terms of the deed and the surrounding circumstances [*Bhaskar* v. *Shrinarayan*, A.I.R. (1960) S.C. 30]. But the condition of refransfer of property to mortgagor should be embodied in the document creating the mortgage. If it is not incorporated in the document, the persumption is that the document is not intended to be a mortgage by conditional sale. If the sale and agreement to repurchase are contained in separate documents, the transaction can never be a mortgage [*Pandit Chunchun Jha* v. *Sheikh Ebadat Ali*, (1955) 1 S.C.R.194].

(2) *Amount of money advanced.* If the amount of money advanced is equal to the market value of the property, the probability is that the transaction is an out-and-out sale with an option to repurchase. if the amount of money advanced is less than the market value of the property, the probability is that the transaction is a mortgage, the reason being that normally a mortgagee would not advance the amount equal to the market value of the property. He would always keep some margin for interest.

(3) *Interest.* If the transaction involves payment of interest on the loan, the presumption it that is is a mortgage by conditional sale. If no interest is payable, the transaction may be a sale with a condition of re-purchase.

(4) *Relation of debtor and creditor.* If in a transaction, there is a relationship of debtor and creditior with a right to redeem the property, the transaction is a mortgage by conditional sale. If there is no subsisting debt and also no right to redeem the property, the transaction is a sale with a condition of repurchase.

3. Usufructuary mortgage or mortgage with possession [Sec. 58 *(d)*]

The word 'usufuct' means the right of enjoying the use and advantages of another person's property. In case of usufructuary mortgage, the mortgagor delivers possession of the mortgaged property to the mortgagee, or expressly or by implication binds himself to deliver possession of the mortgaged property. He further authorises the mortgagee to receive the rents and profits accruing from the property and to appropriate the same in lieu of interest and the principal sum. The mortgagee cannot sue for the recovery of the mortgage-money or for the sale of the mortgaged property ; he can only retain possession of the property till his mortgage-money is fully recovered. He has no personal remedy against the mortgagor.

If the mortgagor does not give possession of the property to the mortgagee, the mortgagee may sue for possession. In case the mortgagor does not give possession, the mortgagee may sue for the recovery of the mortgage-money.

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In case of usufructury mortgage, rents and profits wholly or in part may be appropriated either—

(1) towards payment of interest, or

(2) towards payment of principal, or

(3) partly towards payment of interest and partly towards payment of principal. The liability of the mortgagor is gradually reduced.

In Sec. 58 *(d)*, no time is fixed for the repayment of mortgage-money. Until payment of the mortgage-money, the mortgagee is entitled to retain possession. If the parties stipulate that the mortgage is for a definite period, it is no longer a usufructury mortgage but becomes an anomalous one (*Hikamatulla* v. *Imam Ali*, 12 All. 203).

It is not necessary that a usufuctuary mortgage-deed must always refer to a particular rate of interest. Notice the following case in this regard.

Arumugum Pillai v. *Maruthakutti Gounder*, A.I.R. (1973) Mad. 242. In this case, the mortgagor executed a document styled as usufructuary mortgage-deed on a stamp paper.The mortgagee was to enjoy the property for a period of 5 years and thereafter to deliver the property to the mortgagor. The mortgagee contended that in the absence of a reference to the rate of interest, the document amounted to a lease and not a mortgage. The Court did not uphold this contention. It was observed in this case :

"It is certainly open to the parties to agree that the income from the property accruing over a certain period will be sufficient to cover the principal as well as interest. In the case of a usfructuary mortgage, when the mortgagor and the mortgagee agree that the entire amount due by the mortgagor to the mortgagee should be recouped by the mortgagee by the enjoyment of the usufructs from the mortgaged property over a specified number of years, the document may not refer to any interest payable on the principal even though an element of interest and its rate and the income from the property might have gone into their calculation, when the parties determined the number of years during which the mortgagee was authorised to remain in possession of the mortgaged property for the purpose of reimbursing himself."

4. English mortgage [Sec. 58 *(e)*]

In case of an English mortgage, the mortgagor binds himself to repay the mortgage-money on a certain date. He transfers the mortgaged property absolutely to the mortgagee on the condition that the mortgagee will retransfer the property to the mortgagor upon payment of the mortgage-money. In case of default by the mortgagor, the mortgagee is entitled to sell the property without seeking the permission of the Court.

An English mortgage is in the nature of an absolute transfer of the mortgaged property to the mortgagee. But this does not mean that the mortgagor is not left with any interest in the mortgaged property. The mortgagor has a right of redemption and upon payment of the mortgage-money as agreed he has the right to get back the property. Sec. 58 *(e)* deals with form and not substance. Whatever form is used, nothing more than an interest is transferred and that interest is subject to the right of redemption.

An English mortgage differs from a mortgage by conditional sale as follows :

(1) In English mortgage there is a define binding on the part of the mortgagor to pay ; there is no such binding in mortgage by conditional sale.

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(2) In English mortgage, the mortgagee can sue for the mortgage-money or for the sale of property ; in mortgage by conditional sale, the mortgagee cannot do so.

5. Mortgage by deposit of title deeds or equitable mortgage [Sec. 58 *(f)*]

Where a debtor delivers to a creditor or his agent documents of title to property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title deeds or an equitable mortgage . Such a mortgage can however be created in the towns of Calcutta, Madras and Bombay and in any other town notifieed by a State Government in this regard. Some of the other towns in which mortgage by deposit of title deeds can be created are : Ajmer, Allahabad, Alwar, Bangalore, Bhilwara, Bikaner, Coimbatore, Coconada, Delhi, Jaipur, Jodhpur, Mysore, Narayanganj, Kanpur, Rajahmundry, Tuticorin, Udaipur.

No writing or registration is necessary for the creation of such a mortgage.

A great facility to mercantile community. The mode of creation of mortgage by deposit of title deeds affords a great facility to the mercantile community. In case of emergent need of money, the formality of investigating the title of the mortgagor and of preparing the documents is dispensed with. This facility to create a mortgage however is afforded only to the people in certain towns as already mentioned, and not to any one outside the limits of these towns. Title deeds should therefore be delivered and deposited only in these towns. The property however may be situated anywhere. If the deposit of title deeds takes place in any town other than those mentioned above (and it makes no difference even if the property is located in any one of these towns) there is no valid mortgage [*Basant Lal* v. *Commissioner of Income-tax*, A.I.R. (1932) All. 451].

Deposit of title deeds operates as a contract if there is a clear intention to create a mortgage. The essence of equitable mortgage is that the deposit of title deeds itself operates as a contract between the parties to create a mortgage. But for creation of such a mortgage mere deposit of title deeds is not enough. There must also be a clear intention that the title deeds are deposited with the object of creating a valid mortgage [*United Bank of India, Ltd.* v. *Lekh Ram*, A.I.R. (1965) S.C. 1591]. To infer intention of the contracting parties, it is the substance of the transaction and not its form alone that really matters [*P.G. Rao* v. *The Andhra Bank Ltd.*, (1972) A.L.R. 202]. In the absence of intention to create a mortgage, the mere possession of title deeds will not make the holder *(i.e.,* the creditor) a mortgagee. In *United Bank of India, Ltd* v. *Lekhram*, A.I.R. (1965) S.C. 1591, the Supreme Court observed in this regard :

> "When the debtor deposits with the creditor title deeds of his property with an intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under Sec. 59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent."

Sec. 96 provides that the provisions of the Act which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title deeds also.

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6. Anomalous mortgage [Sec. 58 *(g)*]

A mortgage which does not belong to any on the above categories is called an anomalous mortgage. According to Sec. 58 *(g)*, a mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title deeds within the meaning of Sec. 58, is called an anomalous mortgage. Even when there is a slight variation in the terms and conditions of a mortgage as contained in Sec. 58, the mortgage will be an anomalous mortgage. An anomalous mortgage is primarily a mortgage even though it does not fall under any of the other five categories mentioned in Sec. 58.

An anomalous mortgage quite often is a combination of two or more mortgages, *e.g.*, a combination of a simple and a usufructuary mortgage or a combination of usufructuary mortgage and a mortgage by conditional sale. An example of an anomalous mortgage may be found in the following case :

Ram Dayal & Others v. *Bhanwarlal & Others*, A.I.R. (1973) Raj. 173. In this case both the principal and interest thereon were secured by the mortgage on a certain estate. The possession of the estate was handed over to the mortgagee. The mortgagor also undertook personal liability for payment of interest (which was also secured by the mortgage of the estate). *Held*, it was an anomalous mortgage and not a pure usufructuary mortgage.

Sub-mortgage and puisne mortgage

The following two terms used in connection with mortgages should also be noted :

1. **Sub-mortgage**. When a mortgagee further mortgages the property mortgaged with him by way of security, the mortgage is called a sub-mortgage.

Example. *MR* mortgages his house with *ME*, a money-lender, for Rs. 50,000. *ME* mortgages the house for Rs. 40,000 with *SM*. In this case *ME* creates a sub-mortgage.

The sub-mortgage may be simple, usufructuary or of any other recognised type. The nature of the original mortgage will determine the form of the sub-mortgage. For example, in case of a simple mortgage, the mortgagee cannot create a usufructuary mortgage. This is because in a simple mortgage, the mortgagee is not entitled to possession and as such by creating a subsequent usufructuary mortgage, he cannot give possession to the sub-mortgagee. If he purports to grant such security, he is liable in damages and will have to refund the borrowed amount with interest to the sub-mortgagee. A simple mortgagee may however create a simple sub-mortgage and an equitable mortgagee may create an equitable sub-mortgage by depositing the mortgage-deed [*Maung Thang* v. *M.M. Chettyar Firm*, A.I.R. (1936) Rang. 366].

2. **Puisne mortgage.** Puisne (pronounced as *pyuni)* mortgage is the second mortgage by the mortgagor himself on a property which is already subject to a mortgage. The word 'puisne' means 'junior in rank' or 'next in order'.

Example. *MR* mortgages his house worth Rs. 50,000 to *ME* for Rs. 20,000. He is in need of more money. He creates another mortgage in favour of *PME* on the same house for a further sum of Rs. 15,000. The second mortgage is a *puisne mortgage* and *PME* is the pusine mortgagee. *PME* can recover his debt subject to the rights of *MR*, the first or original mortgagee, to recover the amount due to him (*i.e.*, the principal plus interest).

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Mode of effecting mortgage (Sec. 59)

Where the principal money secuiied is Rs. 100 or upwards, a mortgage (other than a mortgage by deposit of title-deeds) can be effected only by registered instrument. The instrument must be signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than Rs. 100, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

Mortgage and pledge

The important points of difference between a mortgage and a pledge are as follows :

Mortgage	*Pledge*
1. It relates to immovable property.	1. It relates to movable property.
2. There is a transfer of an interest in some specific immovable property.	2. There is only obligation to repay money.
3. The property on which mortgage is created may or may not be transferred to the mortgagee.	3. The possession of property which is pledged is handed over to the creditor (pledgee).
4. There is no bar on creating a number of mortgages on one property.	4. This is just not possible in case of pledge.

RIGHTS AND LIABILITIES OF MORTGAGOR AND MORTGAGEE

Rights of mortgagor

1. **Right of redemption** (Sec. 60). Of the various rights of the mortgagor, the most important is the right to redeem the mortgage. The mortgagor may redeem every transaction in the nature of a mortgage at any time after the mortgage money becomes due. This right of the mortgagor to call back the property (or interest therein which he had parted with at the time of mortgage) by paying of the mortgage-money is called the *right of redemption.* It is inherent in every transaction in the form of mortgage. According to Sec. 60, at any time after the principal money has become due, the mortgagor has a right, on payment or tender, at proper time and place, of the mortgage-money, to require the mortgagee—

(a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and

(c) at the cost of the mortgagor either to re-transfer mortgaged property to him or to such third person as he may direct.

The above options can be excercised by the mortgagor provided the right of redemption conferred by Sec. 60 has not been extinguished by act of the parties, or by decree of a Court.

The right conferred by Sec. 60 is called a *right to redeem* and a suit to enforce it is called a *suit for redemption.*

Redemption of portion of mortgaged property. Law prohibits redemption of a portion of the mortgaged property. Sec. 60 does not entitle a person interested in

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a shate only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage. He can do so *only* where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

When does right of redemption arise ? Right of redemption arises when the mortgage-money becomes due. If a period for the payment of mortgage-money is specified in the mortgage-deed, the mortgagor's right of redemption will arise only after the expirty of that period. If no period is specified, this right arises immediately after the mortgage is created.

Persons who may sue for redemption (Sec. 91). Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely,—

(a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;

(b) any surety for the payment of the mortgage-debt or any part thereof ; or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

Clog on redemption. 'Clog' means 'fetter' or 'obstruction'. Clog on redemption means any provision in the mortgage-deed which prevents the mortgagor from excercising his statutory right of redemption. Lord Macnaghten observed in *Noakes* v. *Rice*, (1902) A.C. 24 : "Redemption is of the very nature and essence of a mortgage, It is inherent in the thing itself."

In *Gangadhar* v. *Shankar Lal*, A.I.R. (1958) S.C. 770, the Supreme Court observed: "The rule against clogs on the equity of redemption is that a mortgage was always to the redeemable and a mortgagor's right to redeem was neither to be taken away nor to be limited by any contract between the parties. Th Courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage."

In *Mohammad Sher Khan* v. *Seth Swami Dayal*, 49 I.A. 60, it was also observed that the right of redemption cannot be defeated by the parties by providing in the mortgage-deed that the mortgagor will not have any such right, nor can it be fettered by any onerous conditions forming part of the mortgage.

Examples of clog on redemption. The following stipulations in a mortgage-deed amount to a clog on redemption and are *void*.

(a) A stipulation in a usufructuary mortgage that if the mortgage is not redeemed within a certain period from the date of mortgage, the mortgagee would become the absolute owner.

(b) A stipulation in a mortgage-deed that the mortgagee shall have the right to get a commission, say 2 per cent, on the gross income of a factory in perpetuity.

(c) A stipulation in a mortgage-deed fixing a long term for redemption only if the condition for redemption is unreasonable, oppressive or unconscionable in nature. Mere fixation of long period for redemption does not amount to a clog on the equity of redemption provided the other terms and conditions of the mortgage are fair and reasonable.

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A contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage, *i.e.*, which amounts to a clog on redemption, is regarded as opposed to public policy. The Courts, therefore, ignore such a contract.

Modes of redemption. A mortgagor may excercise the right of redemption—

(1) *By paying or tendering the mortgage-money* to the mortgagee outside the Court (sec. 60).

(2) *By depositing the amount due in Court* (Sec. 83). At any time after the mortgage-money has become due, the mortgagor may deposit all the money that may be due in a Court, to the account of the mortgagee. The money may also be deposited by any person entitled to institute a suit for redemption of the mortgaged property. Further, the deposit must be made before a suit for redemption of the property becomes time-barred. The Court in which money is to be deposited is one in which the mortgagor might have instituted suit for the redemption of the mortgaged property.

Notice to mortgagee of deposit of money. On the deposit being made, the Court shall cause written notice of the deposit to be served on the mortgagee. The mortgagee may then present a petition (verified in a manner prescribed by law for the verification of plaints) stating the amount due on the mortgage, and his willingness to accept the money so deposited in full discharge of the amount due. He shall also deposit in the same Court the mortgage-deed and all documents in his possession or power relating to the mortgaged property. After he does all this, he shall apply for and receive the money. The mortgage-deed and all other documents so deposited are then delivered to the mortgagor.

Delivery of property to mortgagor or disposal at his instance. Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him-

(1) to deliver possession of the mortgaged property to the mortgagor, or

(2) at the cost of the mortgagor—either *(a)* to retransfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct, or *(b)* to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortagor's interest transferred to the mortgagee has been exinguished.

Payment of interest to cease. If the deposit is validily made in the Court, Sec. 84 comes into play and interest on the principal money ceases to run. Sec. 84 provides that when the mortgagor or such other person as aforesaid has tendered or deposited in Court under Sec. 83 the amount remaining due on the mortgage, interest on the principal money shall cease from the date of the tender. In the case of a deposit made principal money shall cease from the date of the tender. In the case of a deposit made in the Court the interest shall cease where no previous tender of the amount due has been made, as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, and the notice required by Sec. 83 has been served on the mortgagee.

Nothing in Sec. 83 or in Sec. 84 shall be deemed to deprive the mortgagee of his right to interest when there exists a contract that he shall be entitled to reasonable notice before payment or tender of the mortgage-money, and

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such notice has not been given before the making of the tender or deposit, as the case may be.

(3) *By filing a suit for redemption.* A mortgagor or any other person entitled to redeem has also the option to redeem a mortgage by filing a suit for redemption. There is no precondition that the mortgagor should first tender the money to the mortgagee before filing the suit. But if in the plaint he offers to pay the money or deposits the money in the Court, a notice will be served on the mortgagee, of the offer or deposit. On the service of the notice, interest shall cease to run from the date of service of notice.

When the mortgagor files a suit for redemption, the mortgage is not discharged until a decree for redemption is passed by the Court.

2. **Right of assigning the mortgage instead of a retransfer** (Sec. 60-A). Sec. 60-A confers a right on the mortgagor on the fulfilment of conditions of redemption to require the mortgagee to assign the mortgage-debt to a person whom he nominates instead of having a retransfer of the property to himself or any other person as he may direct. Even after the mortgage-debt is paid off, the mortgage is not extinguished. The mortgagee is required to keep the mortgage alive and transfer it to a person when he wants to raise a loan from another person on the same security. He can raise the money by just assignment of the mortgage in favour of the lender rather than first getting the reconveyance of the mortgaged property and then creating a fresh mortgage in favour of the new lender.

The provisions of Sec. 60-A are summed up follows :

(1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a retransfer, he may require the mortgagee, instead of retransferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct. When the mortgagor so directs, the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by Sec. 60-A belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance. But the requisition of any encumbrancer shall prevail over a requisition of the mortgagor. As between encumbrancers, the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of Sec. 60-A do not apply in the case of a mortgagee who is or has been in possession. The reason for this rule is that such a mortgagee remains liable to account for the rents and profits of the property even after the assignment of the mortgage (*Hall* v. *Heward*, 32 Ch. D. 430).

3. **Right to inspection and production of documents** (Sec. 60-B). A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property. The mortgagor has to make a request to the mortgagee for this purpose. He will also have to bear and pay to the mortgagee, the latter's costs and expenses in this behalf. The mortgagee who is in custody of the documents shall be duty bound to comply with the request of the mortgagor in this regard.

4. **Right to redeem separately or simultaneously** (Sec. 61). Where a mortgagor has executed several mortgages in favour of the same mortgagee

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over the same property, he is entitled, in the absence of a contract to the contrary, to redeem any of them without redeeming the others.

A mortgagor is deprived of the benefit of Sec. 61 if there is a contract to the contrary. This contract to the contrary must be specific, unambiguous and explict in terms of the operation if Sec. 61 is to be excluded.

5. **Right of usufructuary mortgagor to recover possession** (Sec. 62). Sec. 62 makes a special provision in case of a usufructuary mortgage as to when the mortgagor can recover possession of the mortgaged property. This provision is supplemental to Sec. 60. According to Sec. 62 where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property, the mortgagor has the right to recover possession of the mortgaged property only when such money is paid, not by the mortgagor in cash or otherwise, but out of the usufructs of the property [*Tirugnana* v. *Nallatambi*, A.I.R. (1925) Mad. 825]. In case of such a mortgage, time is not of the essence of the contract. The mortgagor can recover possession even before the expirty of the term, if any as and when the mortgage debt is paid off.

In some cases, the mortgage-deed may provide for payment of a part only of the mortgage-money out of the rents and profits of the mortgaged property. In such a case if a term is fixed for the payment of the balance of the mortgage-money, the mortgagor can recover possession only when the term has expired and he pays or tenders to the mortgagee, the mortgage-money or the balance thereof or deposits it in Court as provided in Sec. 83. Where no term is fixed, the mortgagor has the right to pay off the balance of the mortgage-money at any time and recover the possession. If a term is fixed, he cannot recover it earlier unless it is specifically provided in the mortgage-deed (*Narasimha* v. *Seshayya*, 48 M.L.J. 363).

6. **Right to accession to mortgaged property** (Sec. 63). Where the mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor shall be entitled as against the mortgagee to such accession together with the possession of the property at the time of redemption. This provision is however subject to the contract between the parties. If there is no such contract, the principle is '*accessio cedit principali*' which means that 'any accretion or increase follows the principal.'

The term 'accession' means an accretion or addition to the mortgaged property. It includes not only physical acquisitions or additions to the mortgaged property but also the acquisition of an interest in property. A simple test is : Any acquisition or accretion which would enhance the value of the mortgaged property in point of area or title or in any other manner would come under the term accession.

Examples. (a) By a gradual, slow and imperceptible means, there is some accretion by alluvion to a piece of land during the period it is in possession of the mortgagee. On redemption, the mortgagor is entitled to possession of accretion also.

(b) Certain lands are mortgaged. During the term of mortgage, some trees grow on the land. On redemption, the mortgagor is entitled to possession of accertion also.

If any accessions are acquired by the mortgagee at his own expense, the rules are as follows :

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(a) If the accession is capable of seperate possession or enjoyment without detriment to the principal property, the mortgagor is not bound to take it. If he chooses to take it, he must pay to the mortgagee the expense of acquiring it.

(b) If separate possession of enjoyment is not possible, the accession must be delivered with the property. The mortgagor in such a case has no option but to take it on redemption. He is liable to pay its cost if the acquisition was necessary to preserve the property from destruction, foreiture or sale, or was made with his assent.

Example. A mortgagee makes necessary repairs to a well with the consent of the mortgagor. The mortgagor is liable to pay the cost of the repairs (*Durga Singh* v. *Naurang Singh*, 17 All. 282).

(c) Where the mortgagcr is liable to pay the cost of the accession, he is also liable to pay interest at the same rate as is payable on the principal money or where no such rate is fixed, at the rate of 9 per cent per annum.

(d) In case *(b)*, the profits, if any, arising from the accession shall be credited to the mortgagor.

(e) Where the mortgage is usufructuary and the accession has been acquired at the expense of the mortgagee, the profits, if any arising from the accession shall, in the absence of a contract to the contrary, be set off against interests, if any, payable on the money so expended.

7. **Right to improvement to mortgaged property** (Sec. 63-A). Where any improvements are made to the mortgaged property by the mortgagee during the continuance of the mortgage, these shall, in absence of a contract to the contrary, belong to the mortgagor on redemption and he shall not be liable to pay the cost thereof except as provided below.

The mortgagor is liable to pay the proper cost of any improvement, in the absence of a contract to the contrary, where such improvement was:

(1) necessary to preserve the property from destruction or deterioration, or

(2) necessary to prevent the security from becoming insufficient, or

(3) made in compliance with the lawful order of any public servant or public authority.

In any of these cases, the mortgagor shall also be liable to pay interest on the cost of improvement at the same rate as is payable on the principal, or, where no such rate is fixed, at the rate of 9 per cent per annum. The profits, if any accruing by reason of the improvement shall be credited to the mortgagor.

The object of these provisions is to prevent the mortgagee from effecting improvements which might ultimately prove to be beyond the means of the mortgagor and thus prevent him with his means from ever redeeming the mortgaged property (*Dayanu* v. *Fakira*, 45 Bom. 1301). If therefore an improvement does not fall within any of the three categories mentioned above, the mortgagor is not liable to pay for it.

8. **Benefit of new lease** (Sec. 64). Where the mortgaged property is a lease and the mortgagee obtains a renewal of the lease during the continuance of the mortgage, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, have the benefit of the new lease.

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A renewal of a lease is of the same nature as an accession to the mortgaged property and therefore the mortgagee is entitled to the cost of the renewal of the lease. Sec. 72 authorities the mortgagee to spend the necessary amount for the renewal of the lease where the mortgaged property is a renewable leasehold. He may, in the absence of a contract to the contrary, add the money spent for the renewal to the principal money. The interest is payable on such money at the same rate as on the principal and where no such rate is fixed, at the rate of 9 per cent per annum.

9. **Power to make lease** (Sec. 65-A). A mortgagor while lawfully in possession of the mortgaged property shall have power to make leases thereof which shall be binding on the mortgagee. This is subject to the following rules :

(a) Every such lease shall be made in the ordinary course of management of the property concerned. It shall also be in accordance with any local law, custom or usage.

(b) Every such lease shall contain a covenant for renewal.

(c) No such lease shall contain a covenant for renewal.

(d) Every such lease shall take effect from a date not later than 6 months from the date on which it is made.

(e) In the case of a lease of buildings, whether leased with or without land on which they stand, the duration of the lease shall in no case exceed 3 years. Further the lease shall contain a covenant for payment of the rent and a condition of re-entry on non-payment of rent within the specified time.

The provisions of Sec. 65-A shall apply if a contrary intention is not expressed in the mortgage-deed. These provisions may however be varied or extended by the mortgage-deed.

Liabilities of mortgagor

Secs. 65 and 66 impose certain liabilities on a mortgagor. Liabilities under Sec. 65 arise out of covenants specified in that Section. These covenants are implied in every mortgage unless all or any of these covenants are excluded by the terms of the mortgage. In the absence of a contract to the contrary, these covenants are as follows :

1. **Covenant for title** (Sec. 65). In every mortgage, the mortgagor is deemed to contract with the mortgagee that—

(1) the interest which he professes to transfer to the mortgagee subsists, and that

(2) he has power to transfer the same.

Even where the mortgagee is aware of the defects in the title of the mortgagor at the time of the execution of the mortgage, the mortgagor is duty bound to disclose defects in the title in the absence of a contract to the contrary [*Veeraswamy* v. *Subba Rao*, A.I.R. (1957) A.P. 288]. If this covenant is broken, the mortgagee is entitled to sue for the mortgage-money at once.

2. **Covenant for defence of title.** The mortgagor impliedly contracts with the mortgagee to defend his title to the mortgaged property when he is in possession of it. Where the mortgagee is in possession of the mortgaged property, the mortgagor covenants to help the mortgagee in defending his title to the mortgaged property. The mortgagee is entitled to spend such money

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as is necessary for supporting the mortgagor's title to the property. He may, in the absence of a contract to the contrary, add the amount so spent to the principal money.

3. **Covenant for payment of public charges.** The mortgagor is under a duty to pay all public charges accruing due in respect of the mortgaged property. He has to pay these charges where he himself continues to be in possession of the mortgaged property or so long as the mortgagee is not in possession of the mortgaged property.

4. **Covenant where the mortgaged property is a lease.** Where the mortgaged property is a lease, the mortgagor is deemed to covenant with the mortgagee, in the absence of a contract to the contrary, that he has paid all the rents payable under the lease. He is further deemed to covenant that he has performed all the conditions contained in the lease. He is also deemed to covenant that so long as the security exists and the mortgagor continues to be in possession of the mortgaged property he shall—

(a) pay all rents,

(b) observe all the conditions of the lease, and

(c) indemnify the mortgagee against all claims sustained by reason of the non-payment of the said rent or the non-performance of the said conditions.

5. **Covenant for payment of prior incumbrances.** Where the mortgage is a second or subsequent incumbrance on the property, the mortgagor covenants to pay the interest from time to time accruing due on such prior incumbrance as and when it becomes due and also discharge the prior incumbrance at the proper time.

The covenants run with the land. The benefit of the above covenants is available not only to the mortgagee but to every person in whom the interest of the mortgagee is vested for the whole or any part of the property from time to time.

Liability for waste (Sec. 66). A mortgagor in possession of the mortgaged property is not liable to the mortgagee for allowing the property to deteriorate. He must not, however, commit any act which is destructive or permanently injurious to the property, if the security is insufficient or will be rendered insufficient by such act. A security is insufficient unless the value of the mortgaged property exceeds by one-third, or, if consisting of buildings exceeds by one-half, the amount for the time being due on the mortgage.

The mortagagee has a right to sue for damages or for recovery of the mortgage-money if the mortgagor is guilty of an act of waste under Sec. 66.

Rights of mortgagee

1. **Right to foreclosure or sale** (Sec. 67). Foreclosure means a legal proceeding that bars or extinguishes a mortgagor's right of redeeming a mortgaged property. In the absence of a contract to the contrary the mortgagee has, at any time after the mortage-money has become due, a right to obtain from the Court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property or a decree that the property be sold. This right can however be exercised before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited.

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A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is callled a *suit for foreclosure.*

The right to foreclosure may be excercised by *(a)* a mortgagee by conditional sale, and *(b)* a mortgagee under an anomalous mortgage which authorities the mortgagee to excercise such right.

It should be noted that the mortgagor's right of redemption and the mortgagees' right to foreclosure are co-extensive, Sec. 67 does not authorise—

(a) any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or

(b) an usufructuary mortgagee as such or a mortgagee by conditional sale as such, to institute a suit for sale ; or

(c) a mortgagor who holds the mortgagees' rights as his trustee or legal representative, and who may sue for sale of the property, to institute a suit for foreclosure ; or

(d) the mortgagee of a railway, canal or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(e) a person interested in part only of the mortgagee-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, wih the consent of the mortgagor, severed their interests under the mortgage.

Sec. 67-A provides that a mortgagee holding two or more mortgages has a right to obtain the same kind of decree as under Sec. 67. If he sues to obtain such decree on any one of the mortgages, he shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due.

2. **Right to sue for mortgage-money** (Sec. 68). The mortgagee has right to sue for the mortgage-money in the following cases :

(1) *Personal covenant.* Where the mortgagor binds himself to repay the mortgage-money, the mortgagee is entitled to sue on the personal covenant of the mortgagor for the recovery of the mortgage-money. In this case, a transferee from the mortgagor or from his legal representative shall not be liable to be sued for mortgage-money.

(2) Security destroyed or rendered insufficient. Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient and mortgagor has failed to provide further security to render the whole security sufficient, the mortgagee has the right to sue for the mortgage-money. But before filing a suit the mortgagee should have given the mortgagor a reasonable oppotunity of providing further security.

(3) *Deprivation of security.* Where the mortgagee is deprived of the whole or a part of his security by or in consequence of the wrongful act or default of the mortgagor, the mortgagee has the right to sue for the mortgage-money. In such a case, he may file a suit for wrong done to immovable property in the Court within the local limits of whose jurisdiction the property is situate.

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(4) *Failure to deliver possession.* Where the mortgagee is entitled to possession of the mortgaged property and the mortgagor fails to deliver the same to him, the mortgagee has the right to sue for the mortgage-money. The object of this provision is to indemnify the mortgagee against the failure of the mortgagor to deliver the property and against any disturbance in the peaceful enjoyment and quiet possession of the property by the mortgagee.

Stay of suit. The Court may, at its discertion, stay the suit and all proceedings therein notwithstanding any contract to the contrary. The Court will stay the suit until the mortgagee has exhausted all his available remedies against the mortgaged property or what remedies against the mortgaged property or what remains of it. If the mortgagee abandons security and, if necessary, retransfers the mortgaged property, the Court will not stay the suit. It should be noted that the Court has discretion to stay the suit only where it is either filed on the personal covenant or in the case of the destruction of the security, wholly or partially, as a result, of some accident or natural cause.

3. **Right of sale without intervention of the Court** (Sec. 69). The mortgagee or any person acting on his behalf shall have power to sell or concur in selling the mortgaged property or any part thereof in default of payment of the mortgage-money. He can do so without the intervention of the Court—

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Muhammadan, or Budhist, or a member of any other race, sect, tribe or class from time to time specified in this behalf by the Government in the Official *Gazette* ; and

(b) where the power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and

(i) the mortgagee is the Government ; or

(ii) the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other specified town.

The power of sale by the mortgagees, it may be noted, has not been given in mofussil towns deliberately. It was observed by Melville, J. in *Keshavrao v. Bhavanji.* 8 Bom. H.C. 142 A.C.J., that it was a wise policy of not allowing sales by mortgagees in the mofussil towns where the money-lenders are greedy and unscrupulous.

Notice. Before excercising the right of sale, the mortgagee shall serve a notice in writing on the mortgagor requiring payment of the principal money. If the mortgagor makes a default in making such payment for 3 months after the service of notice or some interest (not less than Rs. 500) is in arrears and remains unpaid for 3 months, the mortgagee can excercise the right of resale.

Title of purchaser not impeachable. When a sale has been made by the mortgagee in professed excercise of power of sale under Sec. 69, the title of the purchaser shall not be impeachable on the ground *(a)* that no case has arisen to authorize the sale, or *(b)* that due notice was not given, or *(c)* that the power was otherwise improperly or irregularly excercised. But the aggrieved party shall have his remedy in damages against the person excercising the power. This protects the purchaser in the event of an unauthorised excercise of power of sale, but it does not apply to a case where

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the mortgagee has no power of sale at all (*Mataprasad* v. *Kunnon Devi*, 6 Rang. 134).

Disposal of sale proceeds of mortgaged property. The amount of the sale proceeds of the mortgaged property shall be held by the mortgagee in trust. It will be applied by him in the following order :

(1) in payment of all costs, charges and expenses properly incurred by him in order to sell the property ;

(2) in discharge of the mortgage-money and costs and other money, if any, due under the mortgage ; and

(3) the balance to be paid to the person entitled to the mortgaged property.

4. **Right to appoint receiver** (Sec. 69-A). A mortgagee having the right to excercise a power of sale under Sec. 69 is entitled to appoint by writing, a receiver of the income of the mortgaged property or any part thereof . These provisions apply only if and as far as a contrary intention is not expressed in the mortgage-deed.

Who may be appointed a reciever ? (a) Any person who has been named in the mortgage-deeed and is willing and able to act as receiver may be appointed by the mortgagee.

(b) If no person has been so named or if persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees.

(c) If the mortgagor does not agree to an appointment, the mortgagee shall apply to the Court for the appointment of receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions already discussed.

Position of receiver. A receiver appointed under the powers conferred by Sec. 69-A is deemed to be the agent of the mortgagor. Accordingly the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage-deed otherwise provides. The mortgagor is not liable if such acts or defaults are due to the improper intervention of the mortgagee.

Powers of receiver. The receiver shall have power to deemed and recover all the income of which he is appointed receiver, by suit, execution or otherwise. He will do so in the name either of the mortgagor or of the mortgagee. He will also have the power to give valid receipts for the money received. A person paying money to the receiver shall not be concerned to inquire into the validity of his appointment.

The receiver shall also, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured the mortgaged property. He will also keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

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Remuneration of receiver. The receiver shall be entitled to retain out of any money received by him, a commission at the specified rate not exceeding 5 per cent on the gross amount of all money received towards the payment of his remuneration and of all costs, charges and expenses incurred by him as receiver. If no rate is specified, he will be entitled to remuneration at the rate of 5 per cent on the gross amount or at such other rate as the Court thinks fit to allow on application made by him for the purpose.

Duties of the receiver. The receiver shall apply all money received by him in the following order, namely—

(1) in discharge of all rents, taxes, land revenue, rates and outgoings whatever affecting the mortgaged property ;

(2) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is the receiver ;

(3) in payment of his commission, and of the premiums on fire, life or other insurances, if any, properly payable under the mortgage-deed or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ;

(4) in payment of the interest falling due under the mortgage ;

(5) in or towards discharge of the principal money, if so directed in writing by the mortgagee.

If any residue is left of the money received by the receiver after these payments are made, he shall pay it to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

5. **Right of accession to mortgaged property** (Sec. 70). If, after the date of mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.

Examples. (a) A mortgages to *B* a certain field bordering on a river. The field is increased by alluvion. For the purposes of his security, *B* is entitled to the increase.

(b) A mortgages a certain plot of building land to *B* and afterwards erects a house on the plot. For the purposes of his security, *B* is entitled to the house as well as the plot.

The word 'accession' here means something that tends to increase the value of the mortgaged property either by addition made to it or by enlargement of rights in it. Thus 'accession' is not limited to physical accertions or additions. It also includes an increase of interest or enlargement of the estate in respect of the mortgaged property.

Example. A mortgages to *B* a certaion land. He creates a second mortgage on the land in favour of *C*. Subsequently he redeems *B*'s mortgage. This increases the value of the land and amounts to an accretion or accession which is for the benefit of *C* (*Shyama Charan* v. *Anand Chandra*, 3 C.W.N. 323).

6. **Right in case of renewal of mortgaged lease** (Sec. 71). When the mortgaged property is a lease, and the mortgagor obtains a renewal of the

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lease, the mortgagee, in the absence of a contract to the contrary, shall for the purposes of the security be entitled to the new lease. The rights of a mortgagee under this Section are subject to the contract to the contrary. The new lease, as a matter of fact, is treated as "engrafted on the stock of the old lease and forming part of the mortgage security. Accordingly, it is subject to the same rights rearding foreclosure, sale and redemption as the old lease," [*Rakestraw* v. *Brewer*, (1729) 2 P. Wms. 511 ; *Moody* v. *Mathews*, 7 Ves. 174] and the mortgagor must hold the renewed lease subject to the mortgage *(Leigh* v. *Burnett*, 29 Ch. D. 231).

7. **Right to spend money** (Sec. 72). A mortgagee may spend such money as is necessary-

(a) for the preservation of the mortgaged property from destruction, foreiture or sale. This Clause does not cover the case of repairs when the mortgagee is in possession of the mortgaged property or of improvements ;

(b) for supporting the mortgagor's title to the property ;

(c) for making his own title thereto good against the mortgagor. For example, where the mortgagor files a suit against the mortgagee for setting aside the mortgage and the suit is dismissed with costs, the mortgagee is entitled to the cost of defending the suit (*Dattaram* v. *Vinayak*, 28 Bom. 181) ; and

(d) When the mortgaged property is a renewable leasehold, for the renewal of the lease.

The expenditure of money by the mortgagee under Clause *(a)* or Clause *(b)* shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title.

The mortgagee may, in the absence of a contract to the contrary, add the money so spent to the principal money, and will be entitled to interest at the rate payable on the principal, and, where no such rate is fixed, at the rate of 9 per cent per annum.

The right to spend money under Sec. 72 can be excercised by the mortgagee only when there is no contract to the contrary. If in spite of a contract imposing a restriction on the mortgagee to spend money, he spends money on the mortgaged security, he cannot add the amount so spent to the mortgage-debt due to him so as to recover it from the mortgaged property.

Payment of insurance premium. The mortgagee may, in the absence of a contract to the contrary, insure and keep insured against loss or damage by fire the whole or any part of the mortgaged property, when the property by its nature is insurable. The premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal money or where no such rate fixed, at the rate of 9 per cent per annum. But the amount of such insurance shall not exceed the amount specified in this behalf in the mortgage-deed. If no such amount is specified in the mortgage-deed, the amount of insurance shall not exceed two-thirds of the amount that would be required in case of total destruction, to reinstate the property insured.

Sec. 72 does not authorise the mortgagee to insure the mortgaged property when an insurance of the property is kept up by or on behalf of the mortgagor to the amount to which the mortgagee is authorised to insure.

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8. **Right to proceeds of revenue, sale or compensation on acquisition** (Sec. 73). In some cases, the mortgaged property or any part thereof or any interest therein may be sold owing to failure on the part of the mortgagor to pay arrears of revenue or other charges of a public nature or rent due in respect of such property. If such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining, after payment of the arrears and of all charges and deductions by law. Likewise where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation.

These claims of the mortgagee shall prevail against all other claims except those of prior encumbrancers, and may be enforced notwithstanding that the principal money on the mortgage has not become due.

Liabilities of mortgagee

1. **Only one suit for several mortgages** (Sec. 67-A). A mortgagee who holds two or more mortgages from the same mortgagor, is, in the absence of a contract to the contrary, bound to sue on all the mortgages in respect of which the mortgage-money has become due. The mortgages, in this case, may be successive mortgages of the same property or different mortgages of different properties of the same mortgagor.

2. **Liabilities of mortgagee in possession** (Sec. 76). The liabilities of a mortgagee arise only when he takes possession of the mortgaged property. The opening words of Sec. 76 make it abundantly clear. Thus when, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, his liabilities are as follows :

(a) Management. The mortgagee must manage the property as a person of ordinary prudence would manage if it were his own. Where the mortgagee is required by the mortgage-deed to cultivate the land himself, a lease by him is not a prudent act of management [*Narvansa Dharchandra* v. *Laxman Moriramm*, A.I.R. (1976) Bom. 61]. This duty of the mortgagee is similar to the care required from a trustee under Sec. 15 of the Indian Trusts Act, 1882 although a mortgagee in possession is in no sense a trustee for the mortgagor [*Jagannath* v. *Sripathibabu*, A.I.R. (1945) Mad. 297].

(b) Collection of rents and profits. The mortgagee must use his best endeavours to collect the rents and profits of the mortgaged property. He must be diligent in realising rents and profits. If he fails to take the necessary steps to realise rents and profits and neglects to keep or produce accounts, he is guilty of wilful default. He is responsible for such sums as he has actually collected and for sums, if any, as might have been collected by him but for his negligence or default (*Banarsi Prashad* v. *Ram Narain*, 30 I.A. 66).

(c) *Payment of revenue, etc.*. In the absence of a contract to the contrary, the mortgagee must pay out of the income of the property—

(i) the Government revenue,

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(ii) all other charges of a public nature and all rent accruing due in respect of the property during his possession, and

(iii) any arrears of rent in default of payment of which the property may be summarily sold.

In the absence of a contract to the contrary, this duty of the mortgagee to pay Government revenue etc., is to be discharged only out of the income, *i.e.*, usufruct of the property. The mortgagee is not bound to pay these charges out of his pocket. If, however, he pays these charges, he can add the money so paid to the mortgage-money.

(d) Repairs. The mortgagee must, in the absence of a contract to the contrary, make the necessary repairs to the mortgaged property and pay for such repairs. He is bound to do so only if he is left with some surplus out of rents and profits of the property after payments on account of public charges and rents and the interest of the principal money. If the mortgagee fails to make the necessary repairs in spite of surplus profits being sufficient for the purpose, he would be held accountable to the mortgagor for loss caused by non-repair at the time of redemption and such loss may be debited to the mortgagee (*Shiva Devi* v. *Jaru*, 15 Mad. 290).

(e) Destructive acts. The mortgagee must not commit any act which is destructive or permanently injurious to the mortgaged property. He cannot, for example, remove structures on the mortgaged estate. Where any act which is destructive or permanently injurious to the mortgaged property is proved on the part of the mortgagee, he is liable to the mortgagor.

(f) Insurance. Where the mortgagee has insured the whole or any part of the property against loss or damage by fire, he must, in case of such loss or damage, apply any money which he actually receives under the policy—

(i) in reinstating the property, or

(ii) if the mortgagor so directs, in reduction or discharge of the mortgage-money.

If with the money received the property cannot be reinstated, the money should be applied to repair the damage caused to the property by fire.

(g) Accounts. The mortgagee must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee. The cost in this regard shall have to be borne by the mortgagor.

The liability of the mortgagee to render accounts arises only when the mortgagor files a suit for redemption [*Gordhanlal* v. *Thakur Radha Kant*, A.I.R. (1943) All. 109].

This duty of the mortgagee is similar to the duty of a trustee under Sec. 19 of the Indian Trusts Act, 1882.

(h) Mode of accounting. The mortgagee must apply the receipts of rents and profits from the mortgaged property in the following order—

(i) the expenses property incurred for the management of the property and the collection of rents and profits ;

(ii) other expenses incurred by way of public charges and rents and amounts spent on repairs ;

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(iii) interest thereon.

The surplus, if any, has to be utilised for payment of interest ; and so far as such receipts exceed any interest due, in reduction or discharge of the mortgage-money. Still if there is a surplus, it shall be paid to the mortgagor.

Where the mortgaged property is personally occupied by the mortgagee, a fair occupancy rent must be treated as income from property and added to the receipts or profits from the property.

(i) Account for receipts after tender or deposit. When the mortgagor tenders to the mortgagee the mortgage-money or deposits the amount for the time being due on the mortgage in Court, the mortgagee in possession *(i.e.,* where he does not give up the possession of the mortgaged property) must account for his receipts from the mortgaged property from the date of the tender or from the earliest time when he could take such amount out of Court as the case may be. He is not entitled to deduct any amount therefrom, on account of any expenses incurred after such date or time in connection with the mortgaged property.

Loss occasioned by mortgagee's default. If the mortgagee fails to perform any of the duties imposed upon him the foregoing Clauses he may, when accounts are taken in pursuance of a decree, be debited with the loss, if any occasioned by such failure.

Exceptions (Sec. 77). Clauses *(b), (d), (g)* and *(h)* of Sec.76 do not apply where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal. This rule will apply so long as the mortgagee is in possession of the mortgaged property.

Rights of mesne mortgagee (Sec. 94)

Where a property is mortgaged for successive debts to successive mortgagees, a *mesne* mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor.

The rights of a *mesne* mortgagee are summed up in the maxim "redeem up, foreclose down". So far as the redemption, forclosure and sale of the mortgaged property are concerned, the *mesne* mortgagee has the same rights against subsequent mortgagees as he has against the mortgagor. Thus he can excercise the same rights of foreclosure and sale against any subsequent mortgagee as against his mortgagor.

Rights and liabilities of parties to anomalous mortgages (Sec. 98)

In the case of an anomalous mortgage, the rights and liabilities of the parties shall be determined by their contract as evidenced in the mortgage-deed, and, so far as such contract does not extend, by local usage.

Priority of charges or mortgages

The general rule as to priority of charges or mortgages is *"qui prior est tempore potior est jure"*. This means the charge or mortgage which is prior or earlier in time is strong in law. The priority of charges and mortgages, therefore, depends upon the respective dates of their creation, the earlier in date having precedence (*Louds Bank v. P.E. Guzadar & Co.*, 56 Cal. 868).

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Sec. 78 is an exception to this general rule. According to it where, through the fraud, mirespresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

Sec. 78 is based on the doctrine of estoppel.

Example. A prior mortgagee induced a second mortgagee to advance money to the mortgagor by representing that the mortgaged property was free from encumbrances. *Held,* the prior mortgagee, having concurred in inducing the second mortgagee to advance money as a first charge, could not turn ground and claim priority over charge in favour his own mortgage subsisting from an earlier date (*Raman Chetty* v. *Steel Bros.*, 15 C.W.N. 813).

CHARGES

Sec. 100 of the Act defines a charge as follows :

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property ; and all the provisions which herein before contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

The essentials of a charge are as follows :

(1) It must be in respect of immovable property which must serve as a security. The property on which charge is created must be specific and specified and it must be absolutely clear as to what property is exactly charged. If the description of the property is vague and indefinite, the charge will be void for uncertainty.

(2) The immovable property must serve as security for the payment of money.

(3) The charge may be created by the act of parties or it may come into existence by operation of law.

(4) The provisions of the Act which apply to a simple mortgage, so fas as may be, apply also to a charge.

TYPES OF CHARGES

A charge may be created by—

1. Act of the parties, or
2. Operation of Law.

1. Charge created by act of the parties

When both the parties (debtor and creditor) to a transaction, for value, agree that some specific immovable property shall be made available as security for the payment of a debt, a charge is created by the act of the parties. No particular form of words is necessary to create the charge. The Act also does not prescribe any particular mode of creating a charge.

Examples. (a) In a partition deed between the members of a joint Hindu family it was provided that if any of the dividing co-parceners defaulted in paying their debts and if the other co-parceners had to pay it, persons who paid could recover out of the property alloted to the defaulting co-parceners. *Held,* a charge was created (*Imbichi* v. *Achampal Avukoya,* 33 M.L.J. 58).

(b) *A* inherits a property from his grandfather. He executes an agreement to pay his sister *B* a fixed annual sum out of the rents of the property. *B* has a charge on the property.

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2. Charge created by operation of law

A charge created by provisions of an Act *(i.e.,* by stautory provisions) comes into being by operation of law. It is not created by the volition or voluntary action of the parties. It arises as a legal consequence of certain conditions or as a result of some legal obligation.

Examples. (a) An unpaid vendor has a charge for the unpaid price on the property sold.

(b) A co-mortgagor redeems the mortgaged property. He is entitled to claim contribution from other co-mortgagors, and has a charge on the property redeemed.

(c) A court grants a decree of Rs. 1,000 per month to a wife for maintenance, and in case of his husband's default makes his property liable for the amount of maintenace. The wife has a charge over her husband's property.

Exceptions

1. *Charge of a trustee.* Sec. 100 does not apply to the charge of a trustee on the trust property for expenses properly incurred in the execution his trust. This is, as a matter of fact, an exception, not to the definition of 'charge' but to the rights of the party in whose favour the charge is created.

2. *Transferee for consideration.* No charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge. This exception relates to the extent of the enforceability of the charge. It marks an important distinction between a mortgage and a charge. A mortgage can be enforced against the mortgaged property by a mortgagee irrespective of notice. A charge can be enforced against a transferee for consideration only if it is shown that he has taken the transfer with the notice of the charge, *i.e.,* if the *bona fide* purchaser for value was not aware of the charge, it cannot be enforced against him (*Akhoy* v. *Corporation of Calcutta,* 42 Cal. 625).

Distinction between mortgage and charge

Mortgage	*Charge*
1. It is a transfer of an interest in specific immovable property made by a mortgagor as a security for the loan.	1. It does not involve transfer of any interest in the property although it serves as a security for the payment of the loan.
2. It is created by act of the parties.	2. It may be created by act of the parties of by operation of law.
3. It can be enforced against any transferee whether he takes it with or without notice of the mortgage.	3. It cannot be enforced against *bona fide* transferee for consideration having no notice of charge.
4. In a mortgage by conditional sale or in an anomalous mortgage, the mortgagee can foreclose the mortgaged property.	4. A charge-holder cannot foreclose the property on which he has a charge. He can however get the property sold as in a simple mortgage.
5. In a mortgage, there can be security as well as personal liability.	5. In a charge created by act of the parties when a particular property is specified, the remedy of the charge-holder is against the property only.

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Distinction between charged and lien

Charge	*Lien*
1. It may be created by act of the parties or by operation of law.	1. It can arise only by operation of law.
2. It is confined only to immovable property.	2. It may be confined both to movable and immovable property.

Extinguishment of charge

A charge can be extinguished by—

1. *A decree of the Court* obtained by the charge-holder, as in case of a simple mortgage, that the property be sold and the property is sold.

2. *Act of parties.* This includes *(a)* release of the debt or security, or *(b)* novation, or *(c)* merger.

Release. If the mortgagee either releases the debt or the security, the charge is extinguished . If only the security is released , the debt still persists.

Novation. It occurs when a new security is substituted in place of the old security.

Merger. It occurs when a security of higher value is given in place of a security of a lower value.

SECTION 4—LEASES OF IMMOVABLE PROPERTY

A lease is a transfer of right to enjoy some immovable property for certain period on payment of some premium or rent or both.

Sec. 105 defines a 'lease' as follows :

> "A lease of immovable property is a transfer of right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered perodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

Lessor, lessee, premium and rent defined. The transferor is called the *lessor*, the transferee is called the *lessee*, the price is called the *premium*, and the money, share, service, or other thing to be so rendered is called the *rent.*

Essentials of a lease

1. *Transfer.* A lease is a transfer of a right to enjoy and use property. This involves giving possession of the property to the lessee.

2. *Right to enjoy.* In a lease the transfer of an interest in specific immovable property extends only to the enjoyment and use of the property. The lease, therefore, conveys to the lessee only a limited estate in the property. This limited estate which is transferred to the lessee is called a *leasehold* and the estate remaining in the lessor is called a *reversion.*

It should be noted that the transfer of bare right of possession without the right to enjoy or to the usufructs is not a lease.

3. *Duration.* The lease of immovable property must be for a certain period, express or implied, or in perpetuity. Uncertainty as to time is fatal to the validity of the lease. Where a lease is not in perpetuity, it must be for a certain period.

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Where the period of a lease of immovable property is expressed as commencing from a particular day, that day shall be excluded in computing the period of the lease. Where no day of commencement is named, the period of the lease begins from the making of the lease. Where the period of the lease is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day from which the time commences. Where the period of the lease is expressed to be terminable before its expiration, and the lease omits to mention at whose option it is so terminable, the lessee, and not the lessor, shall have such option (Sec. 110).

Presumptions as to duration(Sec. 106). The period of lease may be implied by law or usage. In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year. A lease of immovable property for any other purpose shall be deemed to be a lease from month to month.

Notice for termination. A lease of immovable property for agricultural or manufacturing purposes shall be terminable on the part of either lessor or lessee, by 6 months' notice expiring with the end of a year or the tenancy. A lease for any other purposes shall be terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy.

Every notice for termination shall be in writing signed by or on behalf of the person giving it. It shall either be sent by post to the party who is intended to be bound by it or be tendered or delivered personally to such party. Where personal service is not possible, the notice can be given to one of the members of his family or servants at his residence. If such tender or delivery is not practicable, the notice shall be affixed to a conspicuous part of the property.

Exemption of leases for agricultural purposes (Sec. 117). Sec. 117 exempts leases for agricultural purposes from all the provisions of the Chapter on 'Leases' except in so far as the State Government may, by notification published in the Official *Gazette*, declare all or any of such provisions to be applicable to all or any of such leases. Such notification shall not take effect until the expiry of 6 months from the date of its publication.

4. *Consideration*. The transfer of a right to enjoy the property must be made for a consideration called *premium*. The consideration may be a price paid at the time of the lease or promised to be paid at some time in future as may be agreed upon between the parties. It may consist of money, a share of crops, service or any other things of value, to be rendered, periodically or on specified occasions, to the transferor by the transferee, and any of these things so rendered is technically deemed as rent. Consideration of a lease may be either premium or rent or both.

5. *Acceptance by the transferee*. The transferee must accept the transfer of a right to enjoy property on such terms as may be agreed upon.

Types of tenancies

A tenancy may be for—

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1. a definite period, or
2. an indefinite period. Tenancy for an indefinite period may be—

(a) tenancy-at-will, or

(b) tenancy-by-sufferance.

1. *Tenancy for a definite period.* A tenancy for a definite period is from year to year or month to month. It may be created by express agreement or may, in the absence of a contract, arise by presumption. To begin with, it may be for 1 year only. If after the expiration of 1 year, the lessee continues to be in possession and pays rent to the landlord, the tenancy is regarded as an year to year tenancy. A tenancy for more than a year may be terminated by the landlord by giving 6 months' notice to the lessee to quit. In case of a month to month tenancy 15 days' notice is required.

2. *(a) Tenancy-at-will.* A lease which does not fix the duration of the lease is not valid. If the lessee obtains possession of the leased property under such a lease, a tenancy-at-will is created. Likewise if a tenant continues in possession of premises with the consent of the landlord after the expirty of the periodd of the lease, there is a tenancy-at-will. This tenancy continues till a further period is fixed by a fresh contract. Even for the termination of such a tenancy, the landlord has to give a proper notice.

(b) Tenancy-by-sufferance. If a tenant continues in possession of the leased property after the expiration of the period of the lease, without the consent of the landlord, the possession has no legal validity. In legal fiction such a tenancy is called a ternancy-by-sufferance. It differs from trespass in that the possession is rightful in its inception but wrongful in its continuance [*Mozam Shaijh* v. *Ananda Prasad*, A.I.R. (1942) Cal.341]. The landlord can proceed to recover possession by any legal means and claim *mesne* profits.

Lease and license

A licence is a right to do or continue to do in or upon the immovable property of the grantor something which would in the absence of such right be unlawful and such right does not amount to an easement or an interest in the property (Sec. 52 of the Easements Act, 1882). In a lease, the lessor transfers right to enjoy property during the term of the lease and the lessee gets that right to the exclusion of the lessor. But if a document gives only a right to use the property in a particular way or on certain terms while the property remains in the possession and control of the owner, it will only be a licence (*Seeni Chettiar* v. *Santhanathan*, 20 Mad. 58 F.B.).

Examples of licence. (a) A permission to enter into a garden to cut trees or to remove leaves of trees.

(b) An agreement to tap coconut trees and to take paddy [*Venugopal* v. *Thirunavukkarasu*, A.I.R. (1949) Mad. 148].

(c) Reservation of a space in a mews (stable with living quarters and garages) for garaging X's car at a monthly rental (*Indian Hotels Co.* v. *Pharmacy*, 25 Bom. L.R. 84 F.B.).

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Distinction between licence and lease

Lease	*Licence*
1. There is a transfer of an interest in the immovable property.	1. There is no transfer of interest.
2. A lessee gets the exclusive possession of the property.	2. A licencee gets the right to use the property without exclusive possession.
3. It creates an heritable estate.	3. It does not create an heritable estate.
4. It can be assigned or transferred.	4. It cannot be assigned as it is a personal right. A licencee, therefore, has no transferable interest in the licence.
5. A lessee can sue trespassers.	5. A licencee cannot do so.
6. It cannot be revoked.	6. It is ordinarily revocable.
7. It can be terminated in any of the ways provided by law.	7. It is terminated by death of either party, or by the alienation of property in question.

Modes of creating a lease (Sec.107)

Sec. 107 prescribes the following modes of creating or effecting a lease :

1. *Lease from year to year or for a term exceeding 1 year.* A lease of immovable property from year to year or for any term exceeding 1 year can be made only by a *registered instrument.* Such an instrument shall be executed by both the lessor and the lessee.

A lease or tenancy from year to year may continue so long as the notice of its termination is not given by the landlord or the tenant. If, after the expiry of the first year of a tenancy which is for a year to start with, the lessee continues in possession of the property and pays rent to the landlord who accepts the rent, the tenancy is from year to year.

2. *Lease reserving a yearly rent.* The 'lease reserving a yearly rent' refers to a lease from year to year, in the absence of any contract to the contrary. Such a lease can also be made only by a registered instrument.

3. *Other leases.* All other leases of immovable property other than leases from year to year, or for any term exceeding 1 year, or reserving a yearly rent may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. The State Government may, from time to time by notification in the Official *Gazette*, direct that these leases may be made by an unregistered instrument or by oral agreement without delivery of possession.

Delivery of possession may be actual or constructive.

Determination of lease (Sec. 111)

A lease is determined in any one of the following ways :

1. *By efflux of time.* After the expiration of the fixed term, the lease automatically stands determined on the last day of the term. No formality such as notice on either side is necessary. On the determination of the lease, it is the duty of the lessee to hand over the possession of the leased property to the lessor. If a lease is for a fixed term, it does not terminate during the term if any of the parties dies. In such a case the heirs of the lessee can continue the lease till be expiry of the term. This is because a

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2. *By happening of event on which term depends.* When the time in a lease is limited conditionally on the happening of an event, it determines when the event happens.

Examples. (a) A lease granted for the duration of war comes to an end when the war is over.

(b) A grants a lease to *B* for life. It would come to an end on the death of *B*.

(c) A grants a lease to *B* for 2 years. It is at same time made conditional on the life of *B*. *B* dies after 7 months. The lease comes to an end when *B* dies.

3. *By termination of lessor's interest.* Where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event, the lease terminates by the happening of such event.

Example. A, a tenant for life, grants a lease. Such a lease can last only during his lifetime and it would come to an end on his death.

4. *By merger.* The transfer of the limited estate to the lessee is called a *leasehold* ; what remains of the estate with the lessor is called reversion 'Merger' means the union of the two estates, *i.e.*, the leasehold and the reversion, in one person. When the interest of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right, merger takes place and the lease is determined. Thus where a lessee buys up the estate of the lessor *(i.e.*, reversion), the lease comes to an end.

5. *By express surrender.* A lease may be terminated by express surrender, that is to say, in case the lessee surrenders his interest under the lease to the lessor by mutual agreement between them. In the absence of mutual agreement, there cannot be any express surrender of interest under the lease for determination of the lease. The essence of surrender lies in yielding up the estate to the lessor so that the leasehold interest may come to an end by mutual agreement between the parties. In other words, delivery of possession of the estate to the lessor is essential. Surrender does not require any formal deed ; it may be oral. If however the lease is registered, the surrender can only be by a registered instrument.

6. *By implied surrender.* Implied surrender of a lease occurs when the lessee accepts from his lessor a new lease of property leased, to take effect during the continuance of the existing lease. This implied surrender determines the former lease. Likewise when the lessee abandons the estate or fails to pay the rent, the abandonment or failure may amount to implied surrender.

Implied surrender does not depend on the intention of the parties ; it has to be implied from the conduct of the circumstances of the case, such as relinquishment of possession by the lessee and taking over of possession by the lessor [*Sailabala Dassee* v. *H.A. Tappasier*, A.I.R. (1952) Cal. 455].

Effect of surrender on under-leases (Sec. 115). The surrender, express or emplied, of a lease of immovabale property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease. The under-lessee will be liable in such a case

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to the lessor in respect of his lease unless the surrender of the original lease is made for the purpose of obtaining a new lease. Simply stated, surrender simply operates as an assignment of the lessee's interest to the lessor and thus brings the under-lessee into immediate relation with the lessor [*Mohammad Ibrahim* v. *B.M. Mullick*, I.L.R. (1952) 2 Cal. 167].

7. **By forfeiture.** The various cases in which determination of lease by forfeiture occurs are discussed below:

(a) Breach of express condition. A forfeiture occurs when there is a breach by the lessee of a condition expressly provided in the contract of lease. Such a breach must also confer a right on the lessor to re-enter the leased property. If there is no provision for re-entry on breach of an express condition, breach does not entitle the lessor to treat the lease as forfeited and to eject the tenant (*Kishori Mohan* v. *Nand Kumar*, 24 Cal. 720). In such a case, the lessor will only be entitled to recover damages or get an injunction (*Tamaya* v. *Timpa*, 7 Bom. 262).

(b) Denial of landlord's title. A lease can be forefeited when the tenant disclaims or denies the title of the lessor and claims that somebody else or he himself is the owner of the property. Thus when a tenant refuses to pay rent to the landlord and says to him "You are not my landlord", this amounts to a disclamer [*Doed. Benne* v. *Long*, (1841) 9C.& P.773], which entitles the landlord to forfeit the tenancy.

Blowing hot and cold. The rule that a lessee cannot disclaim or deny the title of the lessor is based on the principal that a man cannot blow hot and cold, *i.e.*, he cannot both approbate (approve) and reprobate (reject). This means if a tenant or lessee accepts a person as his landlord or lessor, he cannot disclaim or deny his title.

(c) Insolvency of lessee. A lease comes to an end by forfeiture where the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter the leased property on the happening of such event. Both insolvency of the lessee and an express and clear provision in the lease for re-entry on the part of the lessor on the adjudication of the lessee as an insolvent are necessary to result in the forfeiture of the lease.

The lease does not determine immediately on the happening of any of the above contingencies. The forfeiture will be complete only when in any of these contingencies the lessor gives notice in writing to the lessee of the intention to determine the lease.

Waiver of forfeiture (Sec. 112). If a lessor, knowing that a forfeiture has been incurred, does any act whereby he acknowledges the continuance of the tenancy, he thereby waives such forfeiture. Thus a foreiture is waived by—

(i) acceptance of rent which has become due since the forfeiture, or by distress for such rent, or

(ii) any other act on the part of the lessor showing an intention to treat the lease as subsisting.

Acceptance of rent accrued due since forfeiture after the institution of a suit to eject the lessee on the ground of forfeiture is not waiver.

Reliefs against forfeiture. These may be—

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(a) Relief against forfeiture for non-payment of rent (Sec. 114). The forfeiture of a lease of immovable property may take place on the ground of non-payment of rent. If the lessor sues to eject the lessee, the Court may relieve the lessee against forfeiture, if at the hearing of the suit, the lessee—

(i) pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or

(ii) gives such security as the Court thinks sufficient for making such payment within 15 days.

The Court makes such an order for relieving the lessee against the forfeiture, in lieu of making a decree for ejectment. If the Court passes such an order, the lessee shall hold the property leased as if the forfeiture had not occurred.

(b) Relief against forfeiture in certain other cases (Sec. 114-A). A lease of immovable property may come to an end by forfeiture or breach of an express condition which provides that on breach thereof the lessor may re-enter. In such a case, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing. The notice must—

(i) specify the particular breach complained of, and

(ii) if the breach is capable of remedy, require the lessee to remedy the breach.

If the lessee fails to remedy the breach, within a reasonable time from the date of the service of the notice, the suit for ejectment shall lie.

The rule embodied in Sec. 114-A shall have no application *(a)* to an express condition against the assigning, under-letting, parting with the possession, or disposing of the property leased, or *(b)* to an express condition relating to forfeiture in case of non-payment of rent.

8. *On expiration of notice to determine the lease or quit the property leased.* A lease of immovable property comes to an end on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other. Notice to terminate a lease is necessary only in case of a periodic tenancy or lease, *i.e.*, where the lease is from year to year or from month to month. Where the lease is from year to year, it shall be terminable, on the part of either lessor or lessee, by 6 months' notice expiring with the end of a year of the tenancy. Where the lease is from month to month, it shall be terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy. The notice must be in writing signed by or behalf of the person giving it.

Waiver of notice (Sec. 113). The notice of determination of lease can be waived. The waiver may be with express or implied consent of the person to whom it is given. It may be by any act on the part of the person giving notice showing an intention to treat the lease as subsisting.

Examples. (a) A, the lessor, gives *B*, the lessee, a notice to quit the property leased. The notice expires. *B* tenders, and *A* accepts, rent which has become due in respect of the property since the expiration of the notice. The notice is waived.

(b) A, the lessor, gives *B*, the lessee, a notice to quit the property leased. The notice expires and *B* remains in possession. *A* gives to *B* as lessee a second notice to quit. The first notice is waived.

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Effect of holding over (Sec. 116)

A lessee or under-lessee of leased property may continue to remain in possession thereof after the determination of the lease. In such a case, if the lessor or his legal representative accepts rent from the lessee or under-lessee or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year or from month to month according to the purpose for which the property is leased.

Examples. (a) A lets a house to *B* for 5 years. *B* underlets the house to *C* at a monthly rent of Rs. 100. The 5 years expire, but *C* continues in possession of the house and pays the rent to *A*. *C*'s lease is renewed from year to year.

(b) A lets a farm to *B* for the life of *C*. *C* dies, but *B* continues in possession with *A*'s assent. *B*'s lease is renewed from year to year.

LIABILITIES AND RIGHTS OF LESSOR AND LESSEE

The liabilities and rights of the lessor and the lessee of immovable property, as against each other, are discussed in Sec. 108. The provisions of Sec. 108 are to be implied in every contract of lease in the absence of a contract of the parties or local usage to the contrary.

Liabilities and rights of lessor

Liabilities of the lessor. In the absence of a contract or local usage to the contrary, the liabilities of the lessor are as follows :

1. *Duty of disclosure.* The lessor is bound to disclose to the lessee any material defects in the property. The disclosure of defects is to be with reference to the intended use of the property of which the lessor is, and the lessee is not, aware. These defects are also such as the lessee could not, with ordinary care, discover. This rule applies only to physical defects of the property and the words 'material defects' in the property with reference to its intended use have reference to the nature and condition of the property leased.

The position of the lessor as regards disclosure of defects of which he is aware is similar to that of the bailor under Sec. 151 of the Indian Contract Act, 1872.

2. *Duty to put lessee in possession.* The lessor is bound to put the lessee in possession of the leased property. He is however bound to give possession to the lessee only when he makes a request to that effect. If the lessee knows the location of the property leased to him (say land) and there is no obstruction to his taking possession of the property, the lessor is not bound to put the lessee in possession. But even in such a case if the lessee requests him to put him in possession, he is bound to do so [*Prabhu Narain* v. *Kamala Prasad*, A.I.R. (1964) Pat. 59].

The lessor cannot recover the rent unless he puts the lessee in possession of the property. If he fails to give possession, the lessee can sue him. The lessee may also sue any third person who may be in possession. He may also sue for damages or for recission of the contract. When he takes any such action, the onus lies on the lessor to prove that the lessee was put by him in possession (*Jogesh Chandra* v. *Emdad Meah*, 59 I.A. 29.)

3. *Covenant for quiet enjoyment.* In a lease, the lessor shall be deemed to contract with the lessee that if the lessee pays the rent reserved by the lease

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and performs the contract on his part, he may hold the property during the time limited by the lease without interruption. This covenant is called a covenant for quiet or undisturbed enjoyment. It presupposes possession and therefore no action would lie on the basis of this covenant unless the lessee has first obtained the possession. If the enjoyment of the lease by the lessee is disturbed in any manner, the lessee can sue for damages.

Examples. (a) Some rooms were let out to a tenant for setting up a dispensary and a laboratory. The landlord refused to give permission to the tenant to get electricity connection. *Held*, the landlord's refusal made the rooms unfit for the contemplated purpose and this resulted in breach of covenant for quiet enjoyment [*Dr. Daryao Singh Rao* v. *Dr. Pramila Bai*, A.I.R. (1959) M.P. 191].

(b) A shop was let to a tenant. The landlord put up scaffolding in close proximity to the shop window. *Held*, it constituted breach of covenant for quiet enjoyment [*Owen* v. *Gadd*, (1956) 2 All E.R. 28].

It may be noted that the lessor is not required to give a covenant for title. But the covenant for giving possession implies such a covenant. If the lessor has no title to the property of the lease, he would be put to a great difficulty in putting the lessee in possession. Further, in the absence of covenant for title, covenant for quiet enjoyment, if broken, would entitle the lessee to recover the loss he may suffer. The loss may include the value of the term of the lease, the cost of any structure he may have erected and also the cost of defending the action for ejectment [*Ralph* v. *Crouch*, (1867) L.R.3 Ex. 44].

Rights of the lessor. The rights of the lessor as such are not discussed in Sec. 108 or in any part of the Chapter on leases. But it would be noted that the provisions of Sec. 108 dealing with the liabilities of a lessee are similar to the rights of the lessor.

Rights and liabilities of the lessee

Rights of the lessee. The rights of a lessee are as follows :

1. *Accession.* 'Accession' means 'accretion'. If during the continuance of the lease, any accession is made to the property, such accession shall be deemed to be comprised in the lease. This is subject to the law relating to alluvion for the time being in force.

A lessee is entitled to any accretion made to the leased property during the continuance of the lease as any accretion is deemed to be comprised in the lease. On the expiration of the lease, that accretion goes to the lessor along with the leased property. Accretion to land, for example, may take place by natural causes or by acts of the lessee. Accretion takes place due to natural causes, where for example land accrets from sea or river by gradual, slow and imperceptible means. In such a case, accretion has the characteristic of the land on which it is formed. Accretion takes place due to the acts of the lessee when he encroaches upon some adjoining lands. The general presumption is that accretions are deemed to be comprised in the lease and go to the lessor on the expiration of the lease.

2. *Avoidance of lease.* The lessee is entitled to avoid the lease if any material part of the property is wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let. The events by which

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the property is destroyed may be fire, tempest or flood, or violence of an army or of a mob, or other irresistible forces. If the injury is occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of this benefit.

Examples. (a) A shed was leased to *B* for a certain period for the purpose of carrying on business. It was blown off by violent gales. *Held*,. *B* could avoid the lease [*Banarsi Das* v. *Amaala Cantonment*, A.I.R. (1933) Lah. 517].

(b) A godown was leased to *X* . It was badly burnt and was rendered wholly unfit for the purpose of storing goods. *Held*, *X* could avoid the lease (*Dhuramsey* v. *Ahmed Bhai*, 23 Bom. 15).

The burden of proof to establish that the property is rendered substantially and permanently unfit for the purpose for which it was let is one the lessee. Whether the property has been rendered substantially and permanently unfit is a question of fact.

3. *Repairs.* Where the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself. The lessee may deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor. The words "any repairs which the lessor is bound to make to the property" refer to an express covenant to repair. In the absence of such a covenant, the lessor is not bound to repair the property and therefore the lessee is not entitled to call upon the lessor to do so [*Steuart & Co., Ltd.* v. *Mackertich*, A.I.R. (1963) Cal. 198].

4. *Deduction of payments.* Sometimes, the lessor may neglect to make certain payments, *e.g.*, ground rent, municipal taxes on the property, which he is bound to make. The result of such default on the part of the lessor is that these amounts are recoverable from the lessee or against the property. If the lessee, being interested in the payment, makes any such payment himself, he may deduct it with interest from the rent, or otherwise recover it from the lessor.

Sec. 69 of the Indian Contract, 1872 also provides that where a person is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

5. *Removal of things attached to the earth.* The lessee may even after the determination of the lease remove at any time whilst he is in possession of the property leased but not afterwards, all things which he has attached to the earth. These things may be trees and shrubs planted by him or structures set up by him on the leased property. But while removing these fixtures, he must see that he leaves property in the state in which he received it (*Vasudevan* v. *Valia*, 24 Mad. 47 F.B.).

6. *Removal of crops.* When due to no fault of the lessee, a lease of uncertain duration (for example, a lease from year to year or a lease terminable on the happening of some event) comes to an end, he is entitled to all the crops planted or sown by him. He is also entitled to free ingress (entry) and egress (departure) to gather and carry the crops growing upon the property when the lease comes to an end. The rule of law in this regard is that "when the law doth give anything to one, it gives impliedly whatsoever is necessary for the taking and enjoying of the same."

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7. *Transfer of interest.* In the absence of a contract to the contrary, a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property. Likewise, any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, be exempted from the liabilities attaching to the lease.

But a tenant having untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, is not authorised to assign his interest as such tenant, farmer or lessee.

Liabilities of the lessee. The liabilities of a lessee are as follows :

1. *Duty to disclose.* The lessee is bound to disclose to the lessor any fact as to the nature or extent of the interest which the lessee is about to take, of which the lessee is, and the lessor is not aware and which materially increases the value of such interest. If he fails to disclose, the lessor can sue him for damages.

2. *Duty to pay premium or rent.* The lessee is bound to pay or tender, at the proper time and place, the premium or rent to the lessor or his agent in this behalf. The rules as regards lessee's duty to pay rent are as follows :

(a) The liability to pay rent commences from the date the lessee is put into possession.

(b) The obligation of the lessee to pay rent is mandatory and he must pay it without any demand being made by the lessor [*Nasiruddin* v. *Umerji Adam & Co.*, A.I.R. (1941) Bom. 286].

(c) The rent must be paid at the proper time. 'Proper time' means the time fixed by the terms of the lease agreement or by custom. Where there is no agreement, the rent becomes payable at the end of the period of the lease [*Rup Lal Mehra* v. *Emperor*, A.I.R. (1945) Lah. 151].

(d) The rent must be paid at a proper place. If the place is not specified in the lease deed, the lessee must find out the lessor to pay the rent, and in such a case 'proper place' for making such payment is the usual place of business or residence of the lessor (*Fakir Lal* v. *Banerji*, C.W.N. 324)

(e) The lessee may discharge his obligation to pay rent by paying to the lessor or his agent in this behalf.

(f) If the lessee does not pay rent, he may incur forfeiture of the lease.

3. *Duty to keep and restore the property in good condition.* The lessee is bound to keep, and on the termination of the lease to restore, the property in as good condition as it was in at the time whjen he was put in possession. If the lessee does not fulfil this duty he is liable to the lessor for the amount which he proves to be reasonable and proper for putting the property in the state in which it ought to have been left (*Sarafali* v. *Subraya*, 20 Bom. 439).

The lessee is however not liable for the changes caused in the property by reasonable wear and tear or irresistible forces such as an earthquake or a fire (*East India Distilleries Ltd.* v. *Mathias*, 51 Mad. 994).

4. *Duty to allow inspection.* The lessee is bound to allow the lessor and his agents, at all reasonable times during the term of the lease, to enter upon the property and inspect the condition thereof. If on inspection any defect is found, the lessor or his agent may give or leave notice of such defect to

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the lessee for effecting the necessary repairs. When the defect has been caused by any act or default on the part of the lessee, his servants or agents, he is bound to make it good within 3 months after the notice has been given or left.

5. *Duty to inform lessor of recovery proceedings or encroachments.* The lessee is bound to inform the lessor, when he becomes aware of any—

(i) proceeding to recover the property or any part thereof, or

(ii) encroachment made upon, or any interference with, the lessor's rights concering such property.

The lessee is bound to give, with reasonable diligence, a notice of the above cases to the lessor. This duty has been imposed on the lessee in view of the fact that he is in possession of the property. If any encroachment is made on the lessor's rights concerning the leased property, the lessee would most likely come to know of it and he has therefore been bound to inform the landlord.

6. *Duty to use property reasonably.* The lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own. But he must not—

(i) use, or permit another to use, property for a purpose other than that for which it was leased, or

(ii) fell or sell timber, or

(iii) pull down or damage buildings belonging to the lessor, or

(iv) work mines or quarries not open when the lease was granted, or

(v) commit any other act which is destructive or permanently injurious to the property.

The lessee may remove all things which he has attached to the earth but he cannot fell or sell timber or pull down or damage buildings belonging to the lessor.

7. *Duty not to erect permanent structures.* The lessee must not, without the lessor's, the lessee consent, erect on the leased property any permanent structure. For agricultural purposes, however, the lessee can erect permanent structures without the consent of the lessor.

If the lessee erects any permanent structure with the consent of the landlord (or for agricultural purposes, without landlord's consent), he may on the determination of the lease while he is in possession of the property, remove them without damaging the leased property.

8. *Duty to put lessor into possession.* On the determination of the lease, the lessee is bound to put the lessor into possession of the leased property. The obligation to restore possession is mandatory. If the lessee refuses to restore possession on the determination of the lease, the lessor may treat the lessee as a trespasser. The lessee cannot refuse to deliver possession even when—

(a) the landlord's title is defective unless subsequent to the lease the landlord's right is ousted by a paramount title—

(b) the lessee was, during the period of the lease, disturbed for a few days in this possession [*Firm Jamita Mal* v. *Gokal Chand*, A.I.R. (1926) Lah. 371].

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(c) the lessee has put up permanent structures to the knowledge of the lessor.

Rights of lessor's transferee (Sec. 109)

If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, gets all the rights of the lessor, But the lessor is not relieved of his liabilities to the lessee. He can be so relieved only if the lessee elects to treat the transferee as the person liable to him [*Ram Bhagwandas* v. *Bombay Municipal Corporation*, A.I.R. (1956) Bom. 364].

The transferee becomes entitled to all the rights of the lessor and he need not even inform the lessee about the transfer. *Vis-a-vis* lessee, he becomes the lessor. He can therefore demand rent due falling due after the transfer or sue for it. But he is not entitled to arrears of rent due before the transfer. If the lessee, not having reasons to believe that the transfer of property has been made, pay rent to the lessor, he shall not be liable to pay such rent over again to the transferee.

When a part of the property is transferred, the transferee gets all the rights of the lessor in respect of that part except as regards premium or rent. For this act, the lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part so transferred. In case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.

SECTION 5—EXCHANGES, GIFTS AND ACTIONABLE CLAIMS

EXCHANGE

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an exhange (Sec. 118).

Exchange is thus a transfer of one thing for another. The things exchanged may be movable or immovable, tangible or intangible. On the execution of the exchange, each party acquires a good title to the thing or property exchanged.

Examples. (a) Exchange of a car for 2 scooters.

(b) Exchange of a horse for a cow.

(c) Exchange of a house for 10 hectares of land.

(d) Exchange of currency notes for coins.

The following points should be noted in connection with exchange :

(1) In exchange, neither thing to be transferred by either party should be money, as in examples *(a)*, *(b)* and *(c)*.

If one party transfers property and the other party pays money in consideration, it is a *sale* and not *exchange*.

Sale differs from exchange in that in sale price is paid in money only whereas in exchange it is paid in goods or by transfer of property by way of barter or partly in goods or property and partly in cash.

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(2) In exchange, payment of money is not altogether ruled out. Where one property is exchanged for another which is more in value and the difference is paid in cash to equalise the values of the two properties, the transaction is an exchange [*Ismail* v. *Saleh Muhammed Shah*, A.I.R. (1925) Lah. 326].

(3) Exchange is not restricted to transfer of movable or immovable property alone, it may also be transfer of one form of money for another as in example *(d)* given above. Money here means legal tender money. Sec. 121 provides that on an exchange of money, each party thereby warrants the genuineness of the money given by him.

(4) To effect exchange, the parties must have property in hand or in possession and the transfer of property by both the parties must be complete. If one party *transfers* property and the other party *promises to transfer* property in return, it is not an exchange.

Exchange how made

To complete an exchange, a transfer of property by each party to the other is involved. This exchange or transfer of property can be effected in the following manner :

1. *By delivery of possession.* Exchange of movable things may be made by mere delivery of possession of property.

2. *By registered instrument.* Exchange of immovable properties or where one of the items is immovable can be effected—

(a) if the value of any one of such properties is Rs. 100 or more, only by a registered instrument ;

(b) if the value of all the properties is less than Rs. 100, by a registered instrument or by delivery of possession of property.

Right and liabilities of parties (Sec. 120)

In exchange, each party is in the position of a seller as well as buyer. In respect of the property he transfers he is in the position of a seller and in respect of the property he takes, he is in the position of a buyer. Sec. 120 therefore clearly provides that each party has the rights and is subject to the liabilities of a seller as to that which he gives, and has the rights and is subject to the liabilities of a buyer as to that which he takes.

Where the properties are immovable, Sec. 55 will determine the rights and liabilities of the parties. Where the properties are movable, the parties will be governed by the provisions of the Sale of Goods Act, 1930 as regards their rights and liabilities.

Right of party deprived of thing received in exchange (Sec. 119)

A party to an exchange may sometimes, by reason of any defect in the title of the other party, be deprived of the thing received by him in exchange. In such a case, unless a contrary intention appears form the terms of the exchange, he can sue the other party for loss caused to him thereby or for the return of the thing transferred, if that thing is still in the possession of the other party. He can also sue the other party's legal representative or a transferee from him without consideration.

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The right conferred by Sec. 119 on the party deprived of the property received by him in an exchange is also available to any person claiming through or under such party.

GIFT

Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the *donor*, to another called, the *donee*, and accepted by or on behalf of the donee. The acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void (Sec. 122).

Essentials of gift

1. *Transfer of ownership.* A gift requires transfer of certain existing movable or immovable property. Unless the transferor divests himself of all the rights in the property and vests them into the transferee there cannot be a valid gift.

2. *Property must be in existence.* A gift can be made only of a property which is in existence at the date of the gift. No gift can be made of a future property [*Brindabini Behari* v. *Oudh Behari*, A.I.R. (1947) All. 179]. If gift is made of a future property, it will be void. Sec. 124 also expressly states that a gift comprising both existing and future property is void as to the latter.

3. *Voluntary transfer.* Transfer of property must be made voluntarily, *i.e.*, by the excercise of an unfettered free will and judgment, in order to result in a gift. The donor must understand the contents of the document and its effects. If any undue influence, force or fraud is excercised upon him, the gift is voidable at his option.

The burden of proving that a gift was not induced by undue influence etc., is on the donee (Sec. 19 of the Indian Contract Act, 1872).

4. *Without consideration.* Gift, which is a voluntary transfer of certain existing property, must be *without* consideration. If some money consideration is involved, the transfer of property is a *sale*. If consideration in the form of some movable or immovable property is involved, it is an *exchange*. The term 'consideration' here has the same meaning as in the Indian Contract Act, 1872. It excludes natural love and affection. Therefore, a transfer in consideration of natural love and affection is a good gift [*Debi Saran* v. *Nandlal*, A.I.R. (1929) Pat. 591]

5. *Acceptance by the donee.* The gift must be accepted by the donee otherwise it is not valid. Such acceptance must be given during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance the gift is void.

The acceptance of a gift by the donee may be express or implied. Where the donee takes possession of the property, there is an acceptance of the gift by the donee (*Kalyansundharam* v. *Karuppa* 54 I.A.39). Further, the acceptance may be made by the donee or anyone on his behalf. For example, a father may accept a gift on behalf of his son. A minor may also accept a gift (as he can be a promisee or a beneficiary in a contract but not promisor).

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When a gift of a thing is made to 2 or more donees, of whom one does not accept, it is void as to his interest only.

Gift how effected (Sec. 123)

A gift (which would be complete by the acceptance by the donee) may be made in the following ways :

1. *Gift of immovable property.* For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least 2 witnesses.

2. *Gift of movable property.* For the purpose of making a gift of movable property, transfer may be effected either by a registered instrument signed as aforesaid or by delivery. Such delivery may be made in the same way as goods may be delivered.

Where the donee is already in possession of the movable property, the donor has only to make a declaration of the gift in favour of the donee. But to complete the gift, the donee must accept it.

Example. A leaves his television set with his friend B, when he goes abroad. On coming back he declares that he gifts his set to B who accepts the gift. The gift is complete.

Suspension or recovation of gift (Sec. 126)

A gift cannot be suspended or revoked at the will and pleasure of the donor. As a matter of fact, a gift which is revocable at the will and pleasure of the donor is no gift at all. Such a gift is called a *resumable gift* and is void.

Grounds for suspension or revocation of gift. A gift may be suspended or revoked on the following grounds :

1. *Agreement.* The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor, a gift shall be suspended or revoked. If that event happens, the gift is revoked. Further if the parties agree that a gift shall be revocable wholly or in part, at the mere will of the donor, it is void wholly or in part as the case may be.

Examples. (a) A gives a field to B, reserving to himself with B's assent, the right to take the field in case B and his descendants die before A. B dies without descendants in A's lifetime. A may take back the field.

(b) A give a lakh of rupees to B, reserving to himself with B 's assent, the right to take back at pleasure Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000, but is void as to Rs. 10,000, which continue to belong to A.

2. *Rescission.* A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. These cases are coercion, undue influence, fraud or misrepresentation. In these cases the contract is voidable at the option of the party whose consent was not free (Sec. 19 of the Indian Contract Act, 1872).

A donor can avoid a gift if it is made under coercion, undue influence, fraud or misrepresentation. Thus where the relations subsisting between a donor and the donee are such that the donee is in a position to dominate the will of the donor and taking advantage of his position induces the donor to confer a gift on him.

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the gift can be set aside. In such a case the onus lies on the donee to prove that the transaction was not induced by undue influence.

Examples. (a) A was staying with *B*. He developed some illicit relations with *B*'s daughter, *D*. *D* induced *B* to make a gift in favour of *A*. *Held*, the gift was induced by undue influence[*Ram Chander Prasad* v. *Sital Prasad*, A.I.R. (1948) Pat. 130].

(b) A spiritual guru induced his discipline to make a gift of some property to him in return for a promise of salvation. *Held*, the gift was induced by undue influence (*Manna Singh* v. *Umadatt Pande*, 12 All. 523).

No other way of revocation. Save as aforesaid, a gift cannot be revoked.

Protection of transferees for consideration without notice. The right of revocation in the cases discussed above does not affect the rights of transferees for consideration without notice.

Example. A makes a gift of his house *B* for setting up a public library. *B instead* sells the house to *T* who knows nothing about the condition imposed by *A* and his right to revoke the gift on its breach. *T* gets a good title to the house. If *T* knows of the condition imposed by *A* and his right to revoke the gift on the breach of the condition, *A* can excercise the right to revoke the gift on the breach of the condition, both against *B* and *T*, as the case may be [*Ali Miji* v. *Ali Sheik*, A.I.R. (1938) Cal. 157].

Conditional gift

Like any other transfer under the Act, a conditional gift can also be made. A gift which comes into existence on the fulfilment of a condition precedent is a conditional gift and is valid. The condition must not however be repugnant to any of the provisions of the Act.

Onerous gift (Sec. 127)

The subject-matter of a gift may be—

(1) a single thing or property, *e.g.*, 20 shares in X Co. Ltd., or a residental house or a shop.

(2) several things, *e.g.*, 20 shares in X Co. Ltd. and 50 shares in Y Co. Ltd., or a residential house and a shop. Gift on such things may be made to a donee *(a)* at one time, or *(b)* independently of each other at different times

If a gift is of a thing which is burdened by an obligation, the gift is called an *onerous gift*. The donee may not accept such a gift.

If a gift is made of several things, any one or more of the things gifted may be burdened by some obligation. In such a case the position of the donee is as follows :

(1) *When there is a single transfer.* Where a gift is in the form of a single transfer to the same person of several things, of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Example. A has shares in *X*, a prosperous joint stock company, and also shares in *Y*, a joint stock company in difficulties. Heavy calls are expected of the shares in *Y*. *A* gives *B* all his shares in joint stock companies *X* and *Y*. *Y* refuses to accept the shares in *Y*. He cannot take the shares in *X*.

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This rule is based on the principle: "*Qui sentit commodum sentire debet et onus*". This means: "He who accepts the benefit of a transaction must also accept the burden of the same."

(2) *When there are two more separate transfers.* Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

Example. A. having a lease for a term of years of house at a rent which he and his representatives are bound to pay during the term, and which is more than the house can be let for, gives to *B* the lease, and also as a separate and independent transaction, a sum of money. *B* refuses to accept the lease. He does not, by his refusal, forfeit the money.

Onerous gift to a disqualified person. A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract, and being aware of the obligation, he retains the property given, he becomes so bound.

Universal donee (Sec. 128)

Where a gift consists of all properties of the donor, the donee is called a *universal donee*. The liability of the universal donee is limited to the extent of the property received by him. Where a donor gifts the whole of his property to a donee, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein. This rule protects the interests of the creditors. In the absence of this rule, a donor would succeed in his dishonest motive of defrauding his creditors [*Sahu Jali* v. *Bahal Singh*, A.I.R. (1945) All. 433].

Exemptions (Sec. 129)

Sec. 129 exempts gifts of movable property from the operation of the provisions relating to gifts, if they are made—

(1) in contemplation of death. A gift made in contemplation of death is called a *donatio mortis causa.*

(2) by Muhammadans in so far as these provisions are inconsistent with the rules of Muhammadan law.

ACTIONABLE CLAIMS

An 'actionable claim' is defined in Sec. 3 as follows :

" 'Actionable claim' means a claim to any debt, other than a debt securred by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional on contingent."

Simply stated, an 'actionable claim' means a claim to—

(1) any unsecured debt, or

(2) any beneficial interest in movable property not in the possession of the claimant.

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The debt or beneficial interest may be existent, accruing, conditional or contingent.

What is a debt ?

A debt is an obligation to pay a certain sum of money. To become an actionable claim, it must be *liquidated*. Further it must not be secured by mortgage of immovable property or by hypothecation or pledge of movable property because such debt is clearly excluded from the definition.

The following, it would be noted, are not actionable claims :

(a) A right to revcover damages for the breach of a contract (*Hirachand* v. *Hemchand*, 47 Bom. 719).

(b) A right to recover the amount wihich may be found to be due on taking an account (*Khetra Mohan* v. *Bishwa Nath*, 51 Cal. 972).

The following are actionable claims :

(a) A claim to recover arrears of rent due [*Madhabilata* v. *Butto Kristo*, A.I.R. (1944) Pat. 139].

(b) A claim to the provident fund that is standing to the credit of a member of the provident fund and that has become due.

(c) A claim under life insurance policy that has matured.

The debt may be existent (present), accruing (future), conditional or contingent. An existent or present debt is one which is existing and is presently or immediately payable. An accruing or future debt is one which exists but is payable at some future date.

Example. A borrows Rs. 500 from *B* at 12 per cent per annum on 1st April and promises to pay back the amount with interest on 1st July. Till 1st July, the debt is an accruing debt and is an actionable claim.

The other examples of future, conditional or contingent debt may be a claim for rent or salary to fall due in future [*Poothekka* v. *Annamalai*, A.I.R. (1926) Mad. 1173], or a claim for maintenance allowance payable at a future date (*Palikandy* v. *Krishnan*, 40 Mad. 302).

What is beneficial interest ?

An actionable claim includes a beneficial interest in the movable property not in possession. Such beneficial interest may also be present or future, conditional or contingent.

Example. A agrees to sell his mortor car to *B* on 1st January, the delivery of the car to be given on 1st February. On the 10th January, *B* assigns the contract to *C*. If *A* fails to deliver the car to *C*. *C* can sue *A* for the recovery of the car. This is because the beneficial interest in the contract relating to movable property (*i.e.*, car) is an actionable claim which can be validily assigned.

Claim to debt must be recognisable by a Civil Court. Sec. 3 also says that an actionable claim is a claim to any unsecured debt or beneficial interest in movable properly which the Civil Courts recognise as affording grounds for relief to the person who claims it.

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Negotiable instruments are not actionable claims (Sec. 137)

Sec. 137 specifically provides that the provisions of Sec. 130 to 136 (dealing with actionable claims) do not apply to—

(1) stocks and shares (as these are transferable according to the Articles of a company and the provisions of the Companies Act, 1956), or debentures (as these are secured debts), or

(2) instruments which are for the time being, by the law or custom, negotiable (as these are governed by the Negotiable Instruments Act, 1881), or

(3) any mercantile document of title to goods.

The expression 'mercantile document of title to goods' includes bill of lading, dock-warrant, warehouse-keeper's certificate, railway receipt, warrant or order for the delivery of goods. It also includes any other document used in the ordinary couse of business as proof of the possession or control of goods or authorising or proporting to authorise, either by endorsement or by delivery, the possessor of the deocument to transfer or receive goods thereby represented.

Transfer of actionable claim (Sec. 130)

Transfer or assignment of an actionable claim may be way of sale, mortgage, exchange or gift.

Transfer by instrument in writing. Sec. 130 prescribes the mode of transferring or assigning an actionable claim. According to it, every transfer of an actionable claim (whether with or without consideration) can be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent. The transfer shall be complete and effectual upon the execution of such instrument only. It is however not necessary to execute a separate instrument. Even an endorsement on the back of an instrument comprising the actionable claim assigning the claim to a certain person is enough (*Rama Iyer* v. *Venkatachellam*, 30 Mad. 75). Upon transfer all the rights and remedies of the transferor, whether by way of damages or otherwise, vest in the transferee, whether notice of the transfer is given or not.

The transferee of an actionable claim may, upon the execution of instrument of transfer, sue or institute proceedings for the same in his own name. He need not obtain the transferor's consent to such suit or proceedings, and need not make him a party thereto

Example. *A* effects a policy on his own life with Life Insurance Corporation and assigns it to a Bank for securing the payment of an existing or future debt. If *A* dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of *A*'s executor.

Exception. The provisions of Sec. 130 do not apply to the transfer of marine or fire policy of insurance or affect the provisions of Sec. 38 of the Insurance Act, 1938.

Liability of transferee of an actionable claim. (Sec. 132). The transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer.

Examples. (a) *A* transfers to *C* a debt due to him by *B*. At the date of transfer, *A* is indebted to *B*. *C* sues *B* for the debt due to *A*. In such suit *B* is entitled

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to set off the debt due by *A* to him, although *C* was unaware of it at the date of such transfer.

(b) A executed a bond in favour of *B* under circumstances which entitled *B* to have it delivered up and cancelled. *B* assings the bond to *C* for value and without notice of such circumstances. *C* cannot enforce the bond against *A*.

In order to protect his interest, the assignee must make inquires as to any equities or liabilities to which the actionable claim is subject [*Venkata Subbiah Chetty* v. *Subba Naidu*, (1915) Mad. W.N. 822]. The assignee will be subject to all the equities or liabilities to which the transferor was subject in respect of the actionable claim irrespective of the fact whether he had notice of such equities or liabilities or not.

Notice of assignment

An actionable claim can be validily transferred by an instrument in writing signed by the transferor or his duly authorised agent. The transfer is complete on the execution of such instrument. The transferor may not give notice of the transfer to the debtor. If the debtor, in ignorance of the transfer or assignment of the debt to the assignee, pays the amount to the assignor (*i.e.* original creditor) the payment will be good as against the assignee.

Example. A owes money to *B* , who transfers the debt to *C*. *B* then demands the debt from *A*, who, not having received notice of the transfer as prescribed in Sec. 131, pays *B*. The payment is valid and *C* cannot sue *A* for the debt.

It is therefore in the interest of the assignee that he gives a notice of assignment to the debtor as early as possible. If after, the receipt of the notice, the debtor pays, by mistake or otherwise, to the assignor any amount, he shall have to pay it over again to the assignee (*Gopalkrishna Iyer* v. *Gopalkrishan*,33 Mad. 123).

Notice to be in writing, signed (Sec. 131). Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorised in that behalf. In case the transferor refuses to sign, the notice shall be signed by the transferee or his agent, and shall state the name and address of the transferee.

No particular form required. A transfer of an actionable claim need not be in any particular form or in any technical language. But the intention to transfer must be sufficiently clear from the language used [*Mohan Lal* v. *Loan Company of Assam*, A.I.R. (1960) Assam 191].

Warranty of solvency of debtor (Sec. 133)

At the time of the assignment of a debt, the assignee may want an assurance from the transferor that the debtor would pay the amount as and when the debt would fall due. Such as assurance from the transferor takes the form of a warranty. In this regard Sec. 133 says that if the transferor of a debt warrants the solvency of the debtor, the warranty, in the absence of a contract to the contrary, applies only to his solvency at the time of the transfer. Where the transfer is made for consideration, the warranty is limited to the amount or value of such consideration.

Mortgaged debt (Sec. 134)

An actionabale claim may sometimes be transferred for the purpose of securing an existing or future debt. If the actionable claim which is trans-

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ferred is a debt, it may be received by the transferor or recovered by the transferee. The amount so received or recovered is applicable :

first, in payment of the costs of such recovery ;

secondly, in or towards satisfaction of the amount for the time being secured by the transfer ; and

the residue, if any, belongs to the transferor or other person entitled to receive the same.

Assignment of rights under policy of fire insurance (Sec. 135)

Where a policy of insurance against fire is assigned by endorsement or other writing, the property in the subject insured shall be absolutely vested in the assignee at the date of the assignment. The assignee shall further have transferred and vested in him all rights of suit as if contract contained in the policy had been made with himself.

Incapacity of officers connected with Courts of justice (Sec. 136)

No judge, legal practitioner or officer connected with any Court of Justice shall buy or traffic in , or stipulate for, or agree to receive any share of, or interest in, any actionable claim, and no Court of Justice shall enforce at his instance, or at the instance of any person claiming by or through him, any actionable claim, so dealt with by him as aforesaid.

TEST QUESTIONS

1. What is meant by transfer of property by the Transfer of Property Act, 1882 ? What are the essentials of a valid transfer of property ?
2. Do the following transactions convey any property so as to amount to a transfer within the meaning of Sec. 5 of the Transfer of Property Act, 1882 ?

   (a) Partition. *(b)* Family arrangements. *(c)* Relinquishment. *(d)* Surrender.
3. Distinguish between 'movable' and 'immovable' property. *(C.S.E. June 1989)*
4. "Property of any kind may be transferred." Discuss, if there are any exceptions to this.
5. Describe the properties which cannot be transferred under the Transfer of Property Act, 1882. *(C.S.E. December 1986)*
6. "Consideration and object of transfer of property must be lawful". Elaborate this statement.
7. Comment : "Transfer must not be opposed to nature of interest."
8. *(a)* What persons are competent to transfer property ?

   (b) Discuss whether property can be transferred to a minor.
9. *(a)* When does property pass to the transferee ?

   (b) Is oral transfer of property valid under Indian Law ? In which cases of transfer is writing necessary ?
10. *(a)* Discuss 'condition restraining alienation'. State the exceptions, if any.

    (b) What do you understand by absolute retraint and partial restraint ?
11. Discuss the rules relating to direction for accumulation of income.
12. Sate the 'rule against perpetuity' with exceptions if any ? *(C.S.E. April 1976)*
13. Write a short note on rule against perpetuity. *(C.S.E December 1988)*
14. Distinguish between a 'vested' interest and a 'contingent' interest. *(C.S.E. December 1992)*
15. "A person cannot approbate and reprobate." Comment.

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16. Discuss fully the doctrine of election as embodied in the Transfer of Property Act, 1882 ?

17. *(a)* "Pending litigation nothing new should be introduced." Discuss.
(b) What is Lis pendens? What are the conditions for its operation ?

18. Discuss the law relating to 'fraudulent transfers'.

19. Define 'sale', and state the essential elements of a valid sale of immovable property. How is a sale of immovable property effected ?

20. Distinguish between a 'sale and a 'contract for sale' in a transfer of immovable property. *(C.S.E. October 1973)*

21. Enumerate the rights and liabilities of a seller of immovable property. *(C.S.E. April 1973)*

22. What are the rights and liabilities of a seller and the buyer of immovable property before and after completion of sale ?

23. *(a)* A property worth Rs. 90 is sold by an unregistered deed. Is the sale valid ?

(b) *A* intends to buy 2 hectares of land belonging to *B*. What precaution should be take so that he acquires a good title ?

24. Does the title to property sold necessarily pass by registration of the instrument of sale ?

25. When is a registered instrument necessary for a sale ? *(C.S.E. April 1973)*

26. What is meant by Marshalling by subsequent purchaser ? *(C.S.E. October 1973)*

27. Define a mortgage and state the characteristics of a mortgage by conditional sale. *(C.S.E. October 1973, April 1970, 1969)*

28. Explain the nature and meaning of 'mortgage'. What is the mode of effecting it ?

29. "Mortgage implies transfer of limited interest in an immovable of property." Explain how the limited interest is transferred under different kinds of mortgages enumerated in Sec. 58 of the Transfer of Property Act 1882 ? *(C.S.E. June 1991)*

30. What are the characteristcs of a simple mortgage'. What is the mode of effecting it ? What are the remedies of the mortgagee in case of default by the mortgagor in paying the mortgage-money ?

31. Distinguish between a mortgage by conditional sale and a sale with a condition of repurchase.

32. State the characteristics of an usufructuary mortgage describing the rights of the mortgagor and mortgagee. *(C.S.E. October 1969)*

33. Distinguish between mortgage and charge. *(C.S.E. December 1987)*

34. Discuss the characteristics of an English mortgage. What are the remedies available to an English mortgagee for the recovery of the debt ?

35. Describe the features of a mortgage by deposit of title deeds. State the mode of effecting it. What are the rights of such a mortgagee ?

36. What is an'equitable mortgage' ? How does it operate against the legal mortgage of the same property ?

37. What is an 'anamolous mortgage' ? What are its characteristics ?

38. What do you underst and by redemption of a mortgage ? What are its effects ? When is this right extinguished ?

39. In what circumstances may a prior mortgage be postponed to that of a later date ? *(C.S.E. October 1972)*

40. Distinguish between foreclosure and sale. Can the following institute a suit for sale or foreclosure—
(a) a simple mortgagee.
(b) a mortgagee by conditional sale.
(c) an usufructury mortgagee.
(d) an English mortgagee.

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41. What are the rights and liabilities of a mortgagee under the Transfer of Property Act, 1882 ? *(C.S.E. October 1975)*

42. Who are the persons entitled to redeem a mortgage ? Discuss the mortgagee's right to sue for the mortgage-money.

43. Discuss the circumstances under which the mortgagee can sell the mortgaged property without the intervention of the Court. What is the effect of an invalid sale ?

44. What is meant by foreclosure ? What is the distinction between foreclosure and right of sale ? *(C.S.E. April 1973)*

45. Explain 'right 'against clog on equity of redemption.' *(C.S.E. December 1991)*

46. *(a)* Definite a charge. Distinguish it from a mortgage.

(b) Distinguish between a mortgage and a charge. *(C.S.E. December 1989)*

47. Define lease. What are the rights and obligations of the lessor and the lessee ? Indicate the types of leases requiring registration *(C.S.E. April 1972)*

48. Explain and discuss the essential elements of a lease. How is it created ?

49. Distinguish a lease from a licence.

50. What are the rules as to computation of time for the *(a)* commencement, *(b)* duration, and *(c)* termination, of a lease of immoveable property ?

51. What are the rights and liabilities of a lessor in a lease of immoveable property ?

52. State the rights of lessor and lessee. *(C.S.E., October 1973)*

53. How does a lease of immovable property determine ?

54. What are different types of tenancies ?

55. What are the grounds for forfeiture of a lease ? *(C.S.E. October 1972)*

56. Define 'exchange'. What is the difference between a sale and an exchange ?

57. What are the rights and liabilities of the parties to an exchange ?

58. What rights has a person who has been deprived of a thing received in exchange by reason of a defect in the title of other party ?

59. Define a 'gift'. What are the essentials of a valid gift ? How is it made ? Is a gift to a minor valid ?

60. How is a gift of immovable property effected ? Can a gift be suspended or revoked ?

61. Explain fully : Actionable claim. *(C.S.E. December 1977)*

62. Write short note on assignment of an actionable claim.

63. What formalities are prescribed by the Transfer of Property Act, 1882, for the transfer of an actionable claim ? What are the rights and liabilities of the transferee of an actionable claim ?

64. How is the right of the transferee of an actionable claim affected by failure to give notice of the transfer to the person against whom the claim is to be enforced ?

65. An agent deposited title deeds of the immovable property of his principal and secured a debt. There was no registration of the mortgage. Does it give rise to a valid mortgage ? *(C.S.E., December 1989)*

66. Write short notes on :

(a) Transfer for the benefit of urborn persons.

(b) Condition making interest determinable on insolvency or attempted alienation.

(c) Vested and contingent interests. *(C.S.E. October 1971)*

(d) Spes Successionis. *(C.S.E. December 1977)*

(e) Simple mortgage. *(C.S.E. October 1974)*

(f) Usufructuary mortgage. *(C.S.E. October 1974)*

(g) Equitable mortgage. *(C.S.E. October 1974)*

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PRACTICAL PROBLEMS

Attempt the following problems, giving reasons :

1. There was a partition between a Hindu father and his five sons. The deed of partition provided that if any of the sons wanted to sell his share he should not sell it to a stranger, but to one of his brothers who should have the option to buy for a sum not exceeding Rs. 10,000. The market value of a son's share was more than Rs. 50,000. One of the sons sells his share to a stranger for Rs. 60,000. Is this sale valid ?

[**Hint** : Yes. Sec. 10].

2. *A* and *B* secretly agree :

(1) that *B* would file a suit against *A* in respect of a house in *A*'s possession ;

(2) that *A* would not seriously contest the suit ;

(3) that during the pendency of the suit *B* would sell the house to one *D* and the money received from *D* would be divided between them.

B files the suit as agreed and during the pendency of the suit sells the house to *D* in the belief that the sale deed to *D* would be set aside having been executed during the pendency of the suit. *B*'s suit is decreed. Can the transfer to *D* be set aside ?

(C.,S.E. June 1987)

[**Hint** : No, as the suit is collusive. Sec. 52].

3. *A* transfers his property to *B*'s son and by the same instrument transfers *B*'s property to *C*. *B*'s son accepts and receives *A*'s property but *B* refuses to transfer his property to *C*. Decide whether under the doctrine of election in the Transfer of Property Act, 1882 *B* is bound to transfer the property to *C*. *(C.S.E. December 1987)*

[**Hint** : Yes. Sec. 35].

4. A document is executed by a donor who makes a gift of immovable property and the deeds are delivered to donee. The donee accepts the gift but the document is not registered. Will the gift be valid ? *(C.S.E. June 1989)*

5. Laxmi executes a mortgage on property *X* and gets it registered. Subsequently Laxmi sells the property to Upendra without informing him of the previous mortgage. Will Upendra be liable for the previous mortgage ? *(C.S.E. June 1989)*

6. *A*, a Hindu, who has separated from his father *B*, sells to *C* 3 fields *X*, *Y*, and *Z* representing that *A* is authorised to transfer the same. Of these fields *Z* does not belong to *A*, it having been retained by *B* on the partition, but on *B*'s dying *A* as their obtains *Z*. Can *C* who has not rescinded the con tract, require *A* to deliver the field *Z* to him? *(C.S.E. June 1988)*

[**Hint** : Yes. Sec. 43].

7. A mortgage deed provided that in case the payment was not made by the mortgagor within the stipulated period, the mortgagee would become the absolute owner of the property. The mortgagor tendered the payment beyond the stipulated period to the mortgagee. Is the mortgagor entitled for redemption ?

[**Hint** : No. Sec. 58].

8. A gives to *B* property worth only Rs. 2,000 and adds a condition that *B* should sell the property for Rs. 50,000 and not below this amount. Is the condition valid ?

(C.S,E. June 1990)

[**Hint** : No. Sec.10].

9. Amarish sells a properly to Chaman for Rs. 25,000. In fact the property belonged to his father but he is named as the sole beneficiary in his father's will. What is the legal effect ? *(C.S.E. December 1991)*

[**Hint** : The sale is not valid if Amarish's father is alive (Sec. 6)].

10. *A* sells three fields *X*, *Y*, and *Z* to B. A represents to *B* that the three fields belong to him. In fact fields *Y* and *Z* belong to A's father and the expects to get them, after his death. While this transaction is in force *A's* father dies and *A* gets fields *Y* and *Z* in inheritance. Can *B* now compel *A* to transfer to him fields *Y* and *Z* ?

(C.S.E. June 1992)

[**Hint** : Yes (Sec. 43)].

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